In the Supreme Court of the United States

No. 489.

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,

Appellant,

vs.

THE UPJOHN COMPANY,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF APPELLANT.

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OPINIONS BELOW.

The Opinion of the Trial Court in this case (R. 371-379), the Court of Common Pleas for Cuyahoga County, Ohio, is not officially reported. It is reported in 1960 Trade Cases, Paragraph 69,778.

The Opinion of the Court of Appeals for Cuyahoga County, including the dissent (R. 380-408), is reported in 117 Ohio App. 207 and at 176 N. E. (2d) 236.

The Opinion of the Supreme Court of Ohio, including the dissent (R. 413-424), is reported in 174 Ohio St. 487 and at 190 N. E. (2d) 460.

JURISDICTION.

This suit was brought on August 28, 1959 (R. 1), by Hudson Distributors, Inc. ("Hudson"), in the Court of Common Pleas of Cuyahoga County, Ohio, against the Upjohn Company ("Upjohn") under the Declaratory Judgment Statute of Ohio (Ohio Rev. Code, Secs. 2721.01-

2721.15) for a judgment declaring the 1959 Fair Trade Act to be null and void as violative of the Supremacy Clause (Article VI, Clause 2) of, and the Fourteenth Amendment to the Constitution of the United States, and repugnant to various provisions of the Constitution of the State of Ohio.

On July 28, 1960, the Court of Common Pleas of Cuyahoga County held that the Fair Trade Act of 1959 was unconstitutional under the Constitution of Ohio (R. 371). The federal constitutional grounds were not reached.

Following Upjohn's appeal on August 16, 1960 (R. 370), the Court of Appeals for Cuyahoga County by a vote of 2 to 1 reversed the Court of Common Pleas, and on September 27, 1961 sustained constitutionality (R. 411-412). The federal constitutional issues raised by Hudson were disposed of by reliance upon *Standard Drug Company, Inc. v. General Electric Company*, 202 Va. 367, 117 S. E. (2d) 289 (1960) *app. dismissed*, 368 U. S. 4 (1961). The Journal Entry of the Court of Appeals entered September 27, 1961

> "ordered that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful, and enforceable enactments of the Ohio General Assembly and *not to be in violation of the Constitution of the State of Ohio or of the Constitution of the United States or of any law of the United States* * * *" (R. 412).

On September 29, 1961 (R. 412), Hudson appealed to the Supreme Court of Ohio. On May 8, 1963, the Ohio Supreme Court, without discussing the federal issues, affirmed the judgment of the Court of Appeals for Cuyahoga County by a vote of three Judges in favor of affirmance and four Judges against (R. 425).

Although a majority of the Judges held the statute to be unconstitutional, the Ohio Supreme Court could not so hold by reason of Article IV, Section 2 of the Ohio Constitution which requires that, except in affirmance of a judgment below, at least six members of the Supreme Court must be of the opinion that a State Statute is unconstitutional before the Court may so declare (R. 424). On May 22, 1963, Hudson filed its Petition for Rehearing in the Ohio Supreme Court, which was denied by the Court on June 12, 1963 (R. 425).

On August 1, 1963, Hudson filed in the Supreme Court of Ohio its Notice of Appeal to the Supreme Court of the United States (R. 426). The Jurisdictional Statement herein was filed on September 24, 1963 and this Court noted probable jurisdiction on December 9, 1963.

The Jurisdiction of the Supreme Court of the United States to review the decision by appeal from the judgment of the Supreme Court of the State of Ohio is conferred by Title 28, United States Code, Section 1257(2).

STATUTES INVOLVED.

The constitutional and statutory provisions involved are the Supremacy Clause (Article VI, Clause 2) of the Federal Constitution; the Due Process Clause of the Fourteenth Amendment to the Federal Constitution; the Miller-Tydings Amendment to the Sherman Act of July 2, 1890, 15 U. S. C. Sec. 1, 50 Stat. 693; the McGuire Act of 1952, 15 U. S. C. Sec. 45(a)(1)-(5), 66 Stat. 632; the Ohio Fair Trade Act of 1959, Ohio Rev. Code Secs. 1333.27 through 1333.34, 128 Ohio Laws 698. They are printed in Appendix A hereto.

QUESTIONS PRESENTED.

1. Whether the Ohio Fair Trade Act violates the Supremacy Clause of the Federal Constitution in that:

(a) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the "proprietor" of a trademark or trade name to establish minimum resale prices for wholesalers with whom the "proprietor" is in competition;

(b) The Act attempts to repeal Section 5(a)(5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the "proprietor" of a trademark or trade name to compel its distributors to enter into "horizontal" (i.e. at the same level of distribution), price fixing agreements or unlawful boycotting arrangements with other distributors;

(c) The Act attempts to repeal Sections 5(a)(2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the "proprietor" of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress.

2. Whether the Ohio Fair Trade Act is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution in that the Act confers upon the "proprietor" of a trademark or trade name a "proprietary interest" in a commodity despite the sale of and receipt of the full price for such commodity with the trademark or trade name affixed thereon, and by reason of such "proprietary interest," empowers the "proprietor" to compel a remote non-consenting vendee to adhere to a minimum resale price.

3. Whether the federally unconstitutional provisions of the Ohio Fair Trade Act are so commingled and entwined with the remainder of the Act and so inseparable therefrom as to make the entire Act unconstitutional under the Federal Constitution.

STATEMENT OF THE CASE.

A. INTRODUCTION: THE NEW OHIO FAIR TRADE LAW.

On January 23, 1958, the Supreme Court of Ohio nullified the nonsigner clause of the Ohio Fair Trade Act of 1936 (O. R. C., Sec. 1333.07), in *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. (2d), 481. The Court held that the nonsigner provision constituted an unauthorized exercise of the police power, contravened the "due process" provision of the Ohio Bill of Rights by denying the nonsigner the privilege of disposing of his own property on terms of his own choosing, and delegated legislative power to private persons.

On June 29, 1959, the Ohio Legislature enacted a new Fair Trade Law (O. R. C., Secs. 1333.27-1333.34). The purpose of the new statute was to overcome the ruling in *Bargain Fair*. As the exposition of the statute was put in the Ohio House Judiciary Committee (R. 210):

> "The Supreme Court, in the Union Carbide case, recognized that if there had been a contract, it would be enforceable. *There will now be a contract arising by the act of the parties, or imposed by statute.*" (Italics added.)

The constitutional infirmity, then, was to be overcome by making "contractors" of all persons who would otherwise be "nonsigners." Gorrell and Brown, *A Re-Examination of Fair Trade Legislation in the Context of the New Ohio*

Fair Trade Act and the Decision in Hudson Distribs., Inc. v. Upjohn Co., (1963) 15 Western Res. L. Rev. 84, 91, 94.

The new statute (Appendix A, at pp. 88 to 95), contains "new concepts" (R. 415).

1. "Proprietor" and "Proprietary Interest."

A "proprietor" (Section 1333.28(K)(1)) is defined to include a person who "identifies a commodity" produced by him "by the use of his trade-mark or trade name." The proprietor is vested with a "proprietary interest" in the identified commodity after he has sold it to distributors. Section 1333.31 provides:

> "A proprietor *shall retain* a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name." (Italics added.)

2. "Contract."

Section 1333.28(I) [1] defines "contract" to mean "any agreement, written or verbal, *or arising from the acts of parties.*"

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[1] "'Contract' means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price estab-

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3. Consideration.

Section 1333.28(I) further defines "a contract and sufficient consideration" for the resale price undertaking. Such contract and consideration consist of the establishment by the proprietor of a minimum resale price for the commodity and the "proprietor's permission" for the distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity.

4. Source of Acquisition as Immaterial to Resale Price Agreement.

Section 1333.28(I) also creates an agreement between the proprietor and distributor who, with notice of the establishment of a minimum resale price, acquires the commodity directly from the proprietor *or otherwise*.[2]

5. "Notice."

Notice is defined by Section 1333.28(J) as

"actual notice given by any method provided in section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence."

(*Continued from preceding page*)

lished by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor."

[2] The last sentence of the Section provides:

"Any distributor (*whether he acquires such commodity directly from the proprietor or otherwise*) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity *shall thereby have entered* into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor." (Italics added.)

Section 1333.30 provides numerous methods for conveying to a distributor notice of the establishment of minimum resale prices, which, following the "acceptance" of a commodity, will create a "contract" pursuant to Section 1333.28(I).[3]

"Conclusive evidence of actual notice" of minimum resale prices is also provided for by Section 1333.30. The third sentence of this section states:

> "The acquisition of or dealing in *merchandise clearly marked*, or enclosed in *containers, packages or dispensers clearly marked*, or the *invoice* for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices." (Italics added.)

Section 1333.30 also provides that a person with actual notice of any applicable minimum resale price is also charged with notice that such a price is subject to change.

6. Establishment of Minimum Resale Price by Contracts *or* Notice; and Differentiation at Different Levels of Distribution.

Section 1333.29 contains three Subparagraphs. The first sentence of Subparagraph (A) sets forth two alternative methods "to establish and control" resale prices, by notice to distributors *or* by contract:

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[3] Section 1333.30 provides that actual notice of a stipulated minimum resale price for a commodity may be given to any person (a) by mail, (b) through advertising, (c) through notice attached to merchandise, to containers, packages, or dispensers thereof, (d) on the invoice therefor, or (e) imparted orally.

The deposit in the mails, postage prepaid, of a letter to a distributor specifying minimum resale prices shall constitute prima facie evidence of actual notice to such distributor.

"It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor *to establish and control by notice to distributors or by contract*, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area."

Subparagraph (A) further provides for minimum resale price differentiation at various levels of distribution and for the change of such prices.[4]

7. Wholesale and Retail Resale Price Maintenance.

Resale price maintenance at the wholesale level is also authorized *although the proprietor sells to retailers in competition with his wholesale distributors.* The last sentence of Section 1333.29(A) provides:

"A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, *even though he sells such commodity to retailers in competition with such wholesale distributors,* if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales." (Italics added.)

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[4] The second and third sentences of Section 1333.29(A) provide:

"Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price."

8. Limitations Upon Channels of Distribution and Marketing Practices by Seller, Distributors and Subvendees.

Subparagraph (B) of Section 1333.29 authorizes the resale price notice or the resale price contract to contain various provisions limiting the buyer's channels of distribution, and imposing limitations and requirements upon both buyer and seller with respect to the resale of the commodity, and the imposition of marketing restrictions upon subvendees.[5]

9. Third Party Beneficiary Provisions.

Section 1333.29(C) provides:

"(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice."

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[5] "(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may sell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell."

10. Defenses: Removal of Trade-Marks.

Section 1333.33 sets forth various defenses to an alleged violation of Section 1333.32 by a sale below the stipulated minimum resale price. Section 1333.33(D) provides such a defense:

> "(D) After the distributor has removed from such commodity *all trace of the proprietor's identifying trade-mark or trade name* and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor." (Italics added.)

Other defenses include the closing out of the distributor's stock of the commodity, the advertisement and sale of second hand or damaged merchandise, and sales by an officer acting under an order of court.

11. Horizontal Price Fixing.

Section 1333.34 prohibits horizontal price fixing "except as otherwise specifically provided in Section 1333.29." Section 1333.34 provides:

> "Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, *except as otherwise specifically provided in section* 1333.29 *of the Revised Code*, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers." (Italics added.)

12. Actions.

By Section 1333.32 (A), sale below the stipulated resale price is made "unlawful and an act of unfair competition," and actions to enforce the statute are authorized. Section 1333.32 is binding upon "any distributor *with*

notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor *or* * * * any distributor who is *in contract with* a proprietor."

13. Purpose.

The statute contains, in Section 1333.27, three paragraphs devoted to the purpose of the enactment.[6] Section 1333.27(A) recites that the statute is enacted "in the exercise of the police power of the state" as well as pursuant to the constitutional authority of the General Asssembly to regulate the sale and conveyance of personal property.

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[6] "Sec. 1333.27. (A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

"(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

"(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling

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Section 1333.27(B) also states as a purpose, the maintenance of "fair, equitable and competitive prices * * * in all appropriate stages in the distribution of * * * identified merchandise * * *."[7]

The new Fair Trade Act became effective on October 22, 1959 after having been passed over the veto of Governor DiSalle. (Amended Petition, R. 5.)

B. ESTABLISHMENT OF HUDSON, METHOD OF OPERATION, AND ACQUISITION OF UPJOHN PRODUCTS IN THE COURSE OF COMMERCE.

In 1958, Appellant ("Hudson") opened a retail drug and cosmetic store in downtown Cleveland (Rudolph, R. 156).

Hudson does not purchase any Upjohn products from Appellee (Shulman, R. 51). Hudson buys Upjohn products from a Michigan warehousing corporation engaged in the sale of drugs and cosmetics to Hudson and other companies which are retailing affiliates of Hudson (Shulman, R. 51).

Hudson purchases such products from the Michigan warehousing corporation in anticipation of the resale of such commodities to the consuming public (Shulman, R.

(Continued from preceding page)

practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers."

[7] It states in part:

"Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines."

51). The purchases are made at weekly intervals; and the warehousing company regularly ships Upjohn products from the State of Michigan to the State of Ohio for resale by Hudson (Shulman, R. 51).

It has been the policy of Hudson to sell goods at a price which brings it a reasonable profit. Hudson does not engage in "loss leader merchandising" or "bait advertising" (Shulman, R. 51). Hudson's method of doing business permits it to make a profit while selling products at prices lower than those set by Upjohn and by other manufacturers of drugs and cosmetics (Shulman, R. 51).

C. INCEPTION OF LITIGATION; STIPULATIONS OF ISSUES AND EVIDENCE.

Upjohn notified Hudson that its products would be on fair trade on October 22, 1959, the effective date of the statute (Exhibit 2 to Answer and Cross-Petition, R. 27); and that it had signed new Fair Trade contracts which would also become effective on that date. On August 28, 1959, Hudson filed a declaratory judgment action to test the constitutionality of the new fair trade act (R. 1). Following the effective date of the statute, Hudson filed an Amended Petition on October 28, 1959 (R. 5). Upon the filing of a Motion to Strike by Upjohn, Hudson filed a Second Amended Petition on January 11, 1960 (R. 8).

Upjohn thereupon filed its Answer denying Hudson's allegations that the 1959 Fair Trade Law was unconstitutional, and a cross-petition praying for temporary and permanent injunctive relief, damages in the amount of Nine Thousand Five Hundred Dollars ($9,500.00), costs and attorneys' fees (R. 14).

Upjohn's answer alleged that it had entered into formal written contracts with retailers in Ohio and had

notified Hudson of the establishment of minimum prices; (R. 15) "and that the condition and consideration for plaintiff to acquire and use defendant's interest in such trade-marks was the agreement and promise by plaintiff not to resell such commodities at less than such established minimum resale prices therefor." A copy of a "Retailer Fair Trade Agreement" was attached as an exhibit to its cross-petition (R. 25).

Hudson filed a reply to Upjohn's answer and an answer to the cross-petition in which it denied all allegations of injury to Upjohn, and also asserted affirmative defenses to the cross-petition, including defenses derived from the McGuire Act (R. 27-30).

In its pleadings in the trial court, in its briefs and in its Petition for Rehearing in the Court of Appeals (R. 409), Hudson attacked the Act as repugnant to various provisions of the Ohio Constitution, and as violative of the Supremacy Clause and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. These respective federal and state grounds were briefed and argued by Hudson in the trial court and in the appellate courts.

On April 20, 1960, the parties by agreement in open court limited the issues before the Trial Court to the question of the constitutionality of the 1959 Fair Trade Law, i.e., on the issues in Hudson's second amended petition, Upjohn's answer and the reply thereto. The issues upon Upjohn's cross-petition for affirmative relief and Hudson's pleadings thereto were reserved.

By further stipulation of the parties, the evidence in the case was specified to be the affidavits and the respective exhibits thereto filed by the parties, and the deposition of Vern L. Smith, Sales Manager of the Cleveland Branch of

Upjohn. Both parties waived cross-examination as to such witnesses and all objections as to the competency of the matters stated in the affidavits and the respective exhibits thereto. The parties reserved all objections to the materiality or relevancy of the evidence (R. 30).

D. THE RECORD DISCLOSES (i) UPJOHN'S METHOD OF SETTING WHOLESALE AND RETAIL FAIR TRADE PRICES, AND (ii) UPJOHN'S WHOLESALE DISTRIBUTION DIRECTLY AND THROUGH OTHERS, INCLUDING ITS COMPETITOR, McKESSON AND ROBBINS, INC. ("McKESSON").

(i) **Upjohn set fair trade prices by two methods.** It gave notice that Upjohn products would be on Fair Trade on October 22, 1959 at the prices appearing in its catalog. Upjohn also entered into Fair Trade Contracts effective on October 22, 1959 (Exhibit 2 to Answer and Cross-Petition, R. 27).

The Upjohn Fair Trade Agreement designates Upjohn as the "proprietor" who "retains an interest" in the good will for its products "so long as commodities bearing its trade-marks, brands or names are offered for sale in commerce." By the contract, the signing retailer is permitted to "enjoy the benefit of the good will" by "referring to said trade-marks, brands or names in the promotion of sales of said commodities by Retailer." (Exhibit 1 to Answer and Cross Petition, R. 25.)

The minimum retail prices under this contract are "those designated in Proprietor's catalog on October 22, 1959." The right to change the catalog is reserved by Proprietor.

This contract is obviously drawn with reference to the "proprietary interest" provisions of the new Ohio Fair Trade Law (O. R. C., Sec. 1333.28(I)).

(ii) **Upjohn manufactures and sells pharmaceuticals and other commodities in commerce in Ohio and throughout the United States.** (Smith, Affidavit, R. 97-98.)

The Deposition of Vern L. Smith, Sales Manager of Upjohn's Cleveland Branch, (R. 86-96), discloses that Upjohn maintains a warehouse and sales office in Cleveland (the "Cleveland Branch"). This Cleveland Branch employs 79 sales representatives who take orders for Upjohn products in various sections of Ohio, Pennsylvania, and New York from retail druggists, hospitals and veterinarians. These orders are processed and shipped from the Cleveland Branch (R. 86-87).

(iii) **McKesson is a manufacturer and a competing wholesaler of Upjohn products.**

McKesson is a manufacturer of proprietary drugs (Nolen, President, McKesson and Robbins, R. 184). It is also one of Upjohn's wholesalers in the area served by the Cleveland Branch (R. 88-89). The McKesson salesmen and the salesmen of Upjohn's Cleveland Branch call on the same pharmacies for orders, and seek to do business with the individual retail pharmacy (R. 89).

Orders taken by McKesson for Upjohn products are sent to the Cleveland Branch where the order is processed and the goods shipped from Upjohn's Cleveland Branch to the Cleveland warehouse of McKesson (R. 89).

Upjohn has issued separate wholesale (R. 433-464) and retail (R. 465-497) price catalogs, each of which sets forth a "Minimum Resale" price. The "Minimum Resale" prices are the fair trade prices under the Upjohn Retailer Fair Trade Agreement (R. 470).

The Retail Edition of the Catalog presents for each commodity a "List Price" and "Minimum Resale" price. On direct sales by Upjohn to the retailer, the retailer pays

a discount of 40 per cent from the "List Price" shown in the retail catalog (R. 466). This discount amounts to approximately one-third off the "Minimum Resale" price—the fair trade price—which appears alongside the "List Price" in the retail catalog.

The Wholesale Edition of the catalog sets forth for each commodity a "Price to Retailer" and the "Minimum Resale" price (e.g. R. 458). McKesson wholesales at a higher price to the retailer than does Upjohn. On Kaopectate, for example, the retailer would pay approximately 15 per cent more to McKesson than to Upjohn (R. 90). McKesson observes Upjohn's wholesale catalog prices (R. 95). Mr. Smith felt that the Upjohn Company regarded the wholesale prices as "in effect in the fair trade State of Ohio" (R. 96).

Retail druggists are willing to pay a higher price for Upjohn products to McKesson because of its very convenient delivery system (Block, R. 72).

By affidavit filed subsequent to his deposition, Mr. Vern L. Smith set forth a *del credere* "Agency Agreement" between Upjohn and its wholesalers which retains in Upjohn the ownership of Upjohn products in the hands of such wholesalers (R. 105-109). This Agency Agreement also requires the agent to remit monthly to Upjohn, at the "Price to the Retailer," for all goods shipped to agent during the preceding month, less a commission of 15 per cent (R. 106). Agent agrees to sell all consigned goods at the "Price to Retailer" in the current Wholesale Edition of the Upjohn catalog (R. 107).

McKesson invoices (Exhibits A through K to Block Affidavit, facing R. 74) give no indication that McKesson is an agent for any manufacturer rather than the owner of the products which it wholesales, whether such products are Upjohn's or McKesson's (R. 70).

E. UPJOHN'S EVIDENCE CONCERNED THE ECONOMIC JUSTIFICATION FOR THE NEW FAIR TRADE LAW AND INJURY TO ITS BUSINESS AND GOOD WILL.

Upjohn argued from the facts of record that the enactment in Ohio of the fair trade legislation was economically necessary.

Appellee presented the Legislative Hearings before the Judiciary Committees of the House of Representatives and Senate of the Ohio Legislature (R. 193-338). Various propositions of economics, Appellee argued in its briefs, were substantiated by this legislative history; and these propositions were reflected in the purpose clauses appearing in Section 1333.27, Paragraphs (A), (B), and (C) (*supra*, note 6).

Upjohn contended that the facts of record presented by it, demonstrated the validity of the economic data presented to the Ohio Legislature and justified the findings which the Legislature made from the economic evidence before it.

Upjohn further contended that Hudson emphasizes the sale of vitamin products and has capitalized upon Upjohn's UNICAP and ZYMACAP vitamins (Smith Affidavit, R. 104). On the basis of affidavits of various proprietor-pharmacists,[8] Upjohn argued that although Hudson employs pharmacists, Hudson does not render the services of a normal drugstore (R. 152, 154, 157), such as delivery service, full prescription service, twenty-four hour service, etc., which a drugstore must be ready to provide in order to meet the medical needs of its community.

Extensive reliance was placed by Upjohn upon the affidavit of William J. Crable, a Pinkerton operative (R.

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[8] Avellone (R. 137-139); Cermak (R. 139-141); Gross (R. 150-153); Bruehler (R. 153-155); Rudolph (R. 156-158).

148-149). Crable was given three prescriptions to be filled, each of which required compounding. Upon Hudson's declining to fill these prescriptions with the notation "Do not have," Mr. Crable had them filled at downtown and suburban drug chain outlets and by neighborhood pharmacists (R. 149). The affidavits of several pharmacists stated that the prescriptions were not unusual (R. 152, 155, 157-158).

No store other than Hudson's at which Crable presented the prescriptions failed to fill them.

Pharmacists' affidavits also stated that Hudson is "skimming the cream" off the retail drug business in the City of Cleveland (R. 154, 157); and Hudson has taken the over-the-counter sale of pharmaceuticals which have been most widely promoted and are in greatest demand and is selling them at cut prices to attract customers into its stores (e.g., R. 150). This is especially the case with Upjohn's UNICAP and ZYMACAP vitamins (Affidavit of Branch Manager Smith, R. 104).

From the foregoing, Upjohn contended that although Hudson poses as a pharmacy, it does not render full pharmaceutical services and fills only the prescriptions which can be handled easily and do not require compounding; and Hudson is exploiting the good will of Upjohn to its own advantage and to the detriment of Upjohn and its legitimate drugstore customers.

Upjohn also contended that its good will had been injured by Hudson. The Affidavit of the Cleveland Branch Manager states that the effect of Hudson's policies appears in the decline in sales of UNICAP and ZYMACAP vitamins for the first three months of each of the years 1958, 1959 and 1960 (R. 103). The affidavits of five pharmacists are also relied upon to demonstrate the slump

in over-the-counter sales of Upjohn drugs and vitamins. The affidavit of Pharmacist Rudolph further states that by reason of Hudson's price cutting, he was abused by his customers, with one of them referring to his vitamin prices and calling him a "Jesse James" (R. 158).

Upjohn argued that the facts in the affidavits of the pharmacists which the Legislature of Ohio took into account, also find support in economic theory, as shown by the affidavit of Professor William R. Davidson of Ohio State University (R. 109). Such evidence is further supported by various industry leaders, as shown in the affidavits of John W. Hubbell, Vice President of the Simmons Company (R. 118-122); Benton F. Kauffman, Vice President of The Kauffman-Lattimer Company, a Columbus, Ohio, drug wholesaler (R. 122-126); Donald E. Noble, President of Rubbermaid Inc. (R. 126-128); Herman T. Van Mell, General Counsel of Sunbeam Corporation (R. 128-134); and Lee Waterman, Vice President of Corning Glass Works in charge of its Consumer Products Division (R. 134-137).

Upjohn also presented in support of the economic necessity for fair trade the affidavits of three hardware retailers (R. 145-146; 146-148; 159-161) and a retail camera dealer (R. 141-144).

F. HUDSON DENIED ANY ECONOMIC JUSTIFICATION FOR THE FAIR TRADE LAW OR ANY INJURY TO UPJOHN.

Hudson contended that there was no economic necessity for the passage of the Fair Trade Law and denied that the record showed any injury to Upjohn.

Hudson presented the affidavits of two Ohio economists, Dr. S. Sterling McMillan, the Chairman of the

Department of Economics of Western Reserve University (R. 31-38), and of Robert Bartels, Professor of Business Organization of Ohio State University (R. 39-50).

The affidavit of Bernard Shulman, the President of Hudson (R. 50-52), noted the increase in national sales of Upjohn in the years 1957 through 1959, although fair trade statutes were not enforced against nonsigners in 19 states and in the District of Columbia. As a result of the merchandising policies of Hudson, an expanding market has been created for the products of Upjohn and other drug manufacturers among people who could not otherwise afford them (R. 51-52).

Neither monopoly nor price war has resulted in the Cleveland area from Hudson's entry into business, nor has Hudson made any attempt to monopolize or institute a price war (R. 52). The sales volume of the Cleveland Branch of Upjohn, the number of customers, and Upjohn's reputation for excellence have steadily increased in each of the years 1957, 1958, and 1959. No drug store or retail outlet in the City of Cleveland has discontinued the sale of Upjohn products in each of these years (Smith Deposition, R. 91-94).

The affidavit of Pharmacist Johns, a pharmacist of 35 years standing and an employee of Hudson, indicated that two pharmacists in the employ of Appellant fill over a thousand prescriptions per week (R. 54). The prescriptions presented by Pinkerton operative Crable, calling for a capsule of powdered charcoal, are seen in not more than 1 in 5,000 prescriptions (R. 55). The pressure of Hudson business usually does not permit the two pharmacists "leeway" time, to handle prescriptions of the kind presented by Investigator Crable (R. 55).

Moreover, affiant had never seen, prior to her employ-

ment at Hudson's, prescription service of the highest quality made available to the public at so reasonable a price (R. 54).

Other economic data was presented concerning the lack of any correlation between business failures and the fair trade laws, the rising income of retail drug stores, the sales and profit increases of drug and cosmetic manufacturers, the increasing volume of vitamin sales, and the impact of fair trade in increasing prices to the consumer by increasing profits for pharmacists (R. 60-69).

G. RULING BY THE SUPREME COURT OF OHIO.

The Opinion in the Supreme Court of Ohio by the minority of three of seven Judges did not discuss the permissible scope of either state fair trade legislation or fair trade contracts under the federal enabling legislation. The Opinion was concerned solely with the validity of the new Fair Trade Act under the laws of Ohio.

The Opinion referred to "the implied contract doctrine" of Section 1333.28(I) as "the heart of the new act." The Opinion characterized the law as "regulating the sale and conveyance of personal property" pursuant to Section 2, Article XIII of the Ohio Constitution. The Opinion also noted that the new act was "much more comprehensive" than the prior law and "introduces into the law two entirely new concepts." (R. 415.)

(i) The first of the new concepts is *the retention by the proprietor of a proprietary interest following the sale* of the commodity to distributors (Section 1333.31). The Opinion noted that the General Assembly has extended the original concept of the trade-mark to include as part of the ownership of the mark, a continuing proprietary interest in the trade-mark or trade name on the merchan-

dise "to the extent that the proprietor can control the resale prices of the merchandise even after it has left his possession or ownership." (R. 416.)

The Opinion held that the General Assembly determined that such "extension of proprietary rights" was necessary not only to protect the property rights in the ownership of a trade-mark or trade name, but also to protect the small businessman and the public in general. In the absence of conclusive evidence to the contrary, the legislative determination would stand. (R. 417.)

(ii) The second of the new concepts is set forth in Section 1333.28(I) defining "*contract.*" The Opinion quoted the entire definition, including the second sentence referring to the establishment of a minimum resale price and "the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trademark" in reselling the commodity as constituting "a contract and sufficient consideration" for the resale price maintenance undertaking by the distributor. (R. 417.)

The Opinion held this provision to be "the core of the act" and interpreted the Section as providing

> "in essence that, when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.
>
> There is no question that express price maintenance contracts are valid. *Garst v. Harris,* 177 Mass., 72; *Grogan v. Chaffee,* 156 Cal., 611." (R. 417.)

The Court went on to state:

> "The statute creates an implied contract by act of the parties. The doctrine of implied contracts is almost as old as the law of contracts. *The simple illustration of the appellees that, where one takes a candy bar from a grocer's shelf and eats it, he obligates*

himself to pay for it is a basic example of an implied contract by act. No word need be said; conduct creates the contract." (R. 418). (Italics added.)

(iii) The Opinion further noted that there was no compulsion on a retailer to handle the trade-marked goods, and cited and relied upon the Opinion of this Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 193, 194 (1936). If the retailer selects the fair trade goods, he must abide by the conditions imposed thereon by the proprietor.

The Court noted the analogy to the purchase of a home where

> "there are in most instances, restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract." (R. 418.)

(iv) With reference to goods coming into Ohio from out of state, the Court stated that:

> "Once trademarked goods come into Ohio the law imposes certain conditions thereon, and they are held subject to those conditions." (R. 419.)

The Court also stated:

> "Under the Ohio law, the owner of the trademark, once the goods enter into Ohio, has by statute sufficient interest to control the resale price of the goods." (R. 419.)

(v) The Opinion also considered whether the "conditions and controls" set forth in the recitals of legislative purposes in Section 1333.27 are "within the police power as declared by the General Assembly." The Opinion found such basis in the preservation of small independent merchants.

The Opinion also found that the owners of trademarks have discovered that "discount selling of their products eventually cheapens them in the eyes of the public with the ultimate effect of injuring the value of the trademark or trade name and reducing their total sales." It was therefore concluded:

> "When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this instance for that of the General Assembly." (R. 422.)

The Opinion also held that there was no unconstitutional delegation of legislative power as to price fixing, or violation of the constitutional right of one to sell his own property on his own terms. Since "the implied contracts herein are valid, the retailer takes the goods on the conditions of the offer and thus voluntarily agrees to comply with the fair-trade price."

The Opinion accordingly held:

> "It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trademark and the goodwill attached to it. * * * The means employed by the act is the long and well established legal doctrine of implied contract. None of the constitutional attacks on this new act have merit." (R. 423-424.)

The majority of the Judges of the Ohio Supreme Court dissented since the new Fair Trade Act attempts arbitrarily to bind nonsigners of price-fixing contracts and undertakes to control the price of seller's trade-marked merchandise by purchasers "who bear no relationship whatsoever to the producers of such merchandise." (R. 424.)

The controlling, though minority, Opinion of the Supreme Court never adverted to any issues concerning federal-state relationships in price fixing by private persons in interstate commerce.

H. THE MINORITY OPINION OF THE OHIO SUPREME COURT DOES NOT SETTLE THE LAW IN THE STATE, AND CONTRARY DECISIONS REMAIN IN FULL FORCE AND EFFECT IN THE SECOND AND THIRD MOST POPULOUS COUNTIES OF OHIO.

By reason of the Opinion by a minority of the Judges in the Supreme Court of Ohio, the law in the State remains in doubt. The constitutionality of the fair trade law remains open for decision by the various Courts of Appeals in Ohio.[9]

The decision in the case at bar in the Court of Appeals for the Cleveland area could not be reversed by the majority of the Judges of the Ohio Supreme Court. In other Ohio counties final judgments have been entered holding the entire Fair Trade Act to be unconstitutional. *Helena Rubinstein v. Cinci Vitamin & Cosmetic Distributors, Inc.*, 84 Ohio L. Abs. 143, 167 N. E. 2d 687 (Common Pleas, Hamilton County [Cincinnati], 1960) and *Bulova Watch Co., Inc. v. Ontario Stores of Columbus, Inc.*, 86 Ohio L. Abs. 585, 176 N. E. 2d 527 (Common Pleas, Franklin County [Columbus], 1961) affirmed without opinion by the Court of Appeals for Franklin County on June 19, 1962.

On the ground of the unconstitutionality of the statute, the Franklin County Court of Appeals in nine companion appeals, affirmed judgments of the Court of Common Pleas below which had sustained demurrers to

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[9] Pogue, *Hudson Fair Trade Case—The Need for Constitutional Amendment* (1963), 12 Clev-Mar. L. Rev., 513.

and dismissed fair trade petitions filed by various drug and cosmetic manufacturers, *Mead Johnson & Co, v. Columbus Vitamin & Cosmetic Distributors, Inc.*, 1962 Trade Cases, Par. 70,360.

In the *Bulova Watch* case, the Court of Common Pleas of Franklin County held the statute to be repugnant to the Miller-Tydings Act and the McGuire Act, hence unconstitutional under the Supremacy Clause of the United States Constitution. The Court of Appeals for Franklin County affirmed. Both the *Helena Rubinstein* and *Bulova Watch* decisions remain in full force and effect, in the second and third most populous counties in Ohio.

Only two propositions remain clear in the fair trade law of Ohio:

(1) A non-signer clause in a fair trade law is unconstitutional. *Union Carbide & Carbon Corp. v. Bargain Fair Inc.*, 167 Ohio St. 182, 147 N. E. 2d, 481 (1958).

(2) Hudson, which would be a "non-signer" under the prior 1936 law is by the 1959 law, "transformed" into a "contractor." [10] There are no longer "signers" or "non-signers" under the law of Ohio.

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[10] "Anyone who purchases goods with knowledge of the established resale price enters into a contract with the proprietor not to sell the goods for less than the established prices while using the proprietor's trademark. Therefore, by the employment of the elementary principles of offer and acceptance, the legislature has provided that a retailer enters into a contract with a proprietor when he purchases goods bearing the proprietor's trademark with knowledge that the proprietor has established resale prices for his goods. The proprietor thus establishes minimum resale prices as a condition for the use of his good will as an aid in the resale."

Gorrell and Brown, *A Re-Examination of Fair Trade Legislation in the Context of the New Ohio Fair Trade Act and the Decision in Hudson Distributors, Inc. v. Upjohn Co.*, 15 West. Res. L. Rev., 84, at 91.

SUMMARY OF ARGUMENT.

The nonsigner clause of the 1936 Ohio Fair Trade Law was held to be unconstitutional by the Supreme Court of Ohio in January, 1958, in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, at 186. The formulation of the 1959 Ohio Fair Trade Law (O. R. C., Sec. 1333.27 to Section 1333.34) was undertaken with a view to making all persons handling "fair-traded" merchandise "parties to the stipulated-price contract." As the legislative history shows (R. 210) "there will now be a contract arising by act of the parties, or imposed by statute."

I. Appellant is entitled to be free from price fixing arrangements in the course of interstate commerce pursuant to state legislation which does not conform with the Miller-Tydings Act and the McGuire Act. Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951); Esso Standard Oil Company v. Secatore's Inc., 246 F. 2d 17 (C. A. 1st, 1957).

Exemptions from the antitrust laws for price fixing "contracts or agreements" in interstate commerce pursuant to state enabling legislation authorized by the Miller-Tydings and the McGuire Acts are in derogation of the fundamental national policy expressed in the antitrust laws and must be strictly construed. In *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305, 316 (1956), this Court held that:

> "* * * Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Moreover, state legislation enacted pursuant to permissive enabling federal legislation must be of the kind contemplated by the Congress before exemption from federal antitrust statutory or administrative regulation may be accomplished. *F. T. C. v. Travelers Health Assn.*, 362 U. S. 293 (1960); *Grand Jury Investigation of Aviation Insurance Industry*, 183 F. Supp. 374 (S. D. N. Y., 1960).

Upjohn drugs and pharmaceuticals sold by retail pharmacies over the counter and by prescription are "in the stream" of interstate commerce (R. 98). *Cf. Northern California Pharmaceutical Assn. v. United States*, 306 F. 2d 379 (C. A. 9, 1962) *cert. den.*, 371 U. S. 862 (1962); *United States v. Utah Pharmaceutical Assn.*, 201 F. Supp. 29 (D. Utah, 1962). Over 90% of the prescriptions sold are dispensed by the pharmacists as precompounded by the manufacturer, without any significant change in form. 306 F. 2d at 386; 201 F. Supp. at 32.

II. The Ohio statute is a fundamental departure from the intent and purpose of the statutory "contract or agreement" system authorized by the Miller-Tydings and McGuire Acts. Its origin and purpose are derived from proposed Congressional legislation designed to jettison the resale price maintenance methods presently authorized.

A. *The Ohio statute is based upon the retention, by fiat of resale price maintenance statute, of a "proprietary interest" in the commodity which is the subject of resale price maintenance.* This statutory device was originated in 1957 in MacLachlan, *A New Approach to Resale Price Maintenance* (1957) 11 Vanderbilt L. Rev. 145.[11]

[11] A chart of sources of various provisions of the 1959 Ohio Fair Trade Law appears at the conclusion of "Summary of Argument."

It was the purpose of the proposed MacLachlan legislation to enact a *federal* resale price maintenance law based upon trade-marks in commerce. With its conception of "proprietary interest," the MacLachlan legislation would also "organize the market" for the trade-marked commodity at every level of distribution, on a national basis. J. A. MacLachlan, *Hearings on H. R. 10527 (Harris Bill)* etc. (1958), Eighty-Fifth Cong., Second Sess., 265.

The impetus for the proposed legislation arose from the conviction in Congress that, by the end of 1957 the "contract" method of maintaining fair trade prices had failed.[12] Many State Supreme Courts had declared the nonsigner provisions unconstitutional. This Court's ruling in *United States v. McKesson and Robbins, Inc.*, made clear that horizontal price fixing between a dual-distributing manufacturer and his wholesalers was prohibited. By the rulings in the Courts of Appeals for the Second and

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[12] H. Rep. No. 467, 86th Cong., 1st Sess., on H. R. 1253 (Harris Bill), 4-7, June 9, 1959. As of March 1, 1958, the Supreme Court of 13 states had declared the nonsigner clauses of their respective fair trade laws invalid:

Arkansas	Kentucky	Oregon
Colorado	Louisiana	South Carolina
Florida	Michigan	Utah
Georgia	New Mexico	
Indiana	Ohio	

The Supreme Courts of two states voided their entire fair trade acts; Nebraska and Virginia (reenacted March 1, 1958). These states joined with Missouri, Texas, Vermont and the District of Columbia as areas that had no fair trade acts. *Hearings on H. R.* 10527 (*Harris Bill*) etc., (1958) Eighty-fifth Congress, Second Session, 407 *Testimony of Herman S. Waller*, Counsel, National Association of Retail Druggists.

Fair Trade has now become constitutionally inoperative against nonsigners in over twenty states. Additionally, six states have no laws at all. Trade Reg. Rep., Pars. 6017, 6041; Alexander, *Quality Stabilization and the Crisis in Fair Trade* (1963) 51 Georgetown L. J. 783; H. Rep. 2352, 87th Cong., 2d Sess., on H. J. Res. 636 ("Quality Stabilization") 6-9, Sept. 12, 1962; H. Rep. No. 566, Eighty-eighth Cong., First Sess., on H. R. 3669 ("Quality Stabilization"). 5-6, July 22, 1963.

Fourth Circuits in *General Electric Company v. Masters Mail Order Co. of Washington, D. C.*, 244 F. 2d 681 (C. A. 2d, 1957), *cert. den.* 355 U. S. 824 (1957), and *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D. C., Inc.*, 240 F. 2d 684 (C. A. 4, 1957), it was held lawful for a mail order discount house, by consummating the sale of commodities in a nonfair trade state, to sell fair-traded merchandise at a discount in a fair trade state.

Moreover, many fair traders found burdensome the interpretations of Section 1 of the Sherman Act enunciated by this Court—applicable to *intrabrand* as well as to *interbrand* competition—that a combination or boycott instituted by a manufacturer and his distributors which sought to create, maintain or extend price fixing, with or without benefit of fair trade, was unlawful under Section 1 of the Sherman Act. *United States v. Bausch and Lomb Co.*, 321 U. S. 707 (1944); *United States v. Frankfort Distillers, Inc.*, 324 U. S. 293 (1945); *United States v. Parke, Davis and Co.*, 365 U. S. 125 (1961).

The proposals of Professor MacLachlan were carried over into the Harris Bills upon which hearings were held in 1958 and 1959 by the Congress,[13] and which were fa-

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[13] Hearings on such legislation were as follows: *Hearings Before a Subcommittee on the Committee on Interstate and Foreign Commerce*, House of Representatives, Eighty-fifth Congress, Second Session on H. R. 10527, H. R. 10770, H. R. 10847, H. R. 11048, H. R. 11216, and H. R. 11264, April 29, 30, May 1, 6, and 7, 1958; *Hearings Before the Committee on Interstate and Foreign Commerce*, House of Representatives, Eighty-sixth Congress, First Session, on H. R. 768, H. R. 1253, H. R. 2463, H. R. 2729, H. R. 3187, H. R. 5252, and H. R. 5062, March 16, 17, 18, 19, 20, 23, 24, and 25, 1959; *Hearings Before a Special Subcommittee on Fair Trade of the Committee on Interstate and Foreign Commerce*, United States Senate, Eighty-sixth Congress, First Session on S. 1083, June 15, 16, and July 10, 1959.

vorably reported upon by the House Committee on Interstate and Foreign Commerce.[14] None of these bills was ever enacted into law.

B. *The MacLachlan proposal, the Harris Bills and the Ohio Statute are based upon fundamental proposals relating to commerce upon which Congressional action is required, and which are wholly beyond the scope of the state legislation authorized by the Miller-Tydings and McGuire Acts.*

The MacLachlan proposal and every variation of the Harris Bill, including the Ohio Fair Trade Law of 1959 contain the basic provisions envisaged by Professor MacLachlan's suggested new approach:

1. Retention of a "proprietary interest" in the commodity by the proprietor of the trademark, brand or trade-name; and the giving of notice of such proprietary interest by the "proprietor."

2. Renunciation of *United States v. McKesson and Robbins, Inc.*, by permitting resale price maintenance by notice at the wholesale level by the "proprietor," although he sells in competition with wholesalers, so long as he sells at the applicable price established for comparable sales by distributors.

3. A legislative repeal of the "Masters Discount Mail Order House" cases by making unlawful the sale below "fair trade" price by any person with actual notice of the establishment of a resale price by the proprietor; and, by such provision, assisting in thwarting the "diversion" of merchandise by means of interstate sales by discounters.

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[14] House Rep. No. 467, Eighty-sixth Congress, First Session, June 9, 1959.

4. By direct statutory provision, or by implication, promoting cooperation by all distributors of merchandise of the same proprietor sold under the same mark in maintaining stipulated or minimum prices established by the proprietor.

The 1959 Ohio Fair Trade Law contains each and every of the foregoing provisions.[15]

In accordance with its recited objective of maintaining prices "in all appropriate stages in the distribution" of goods in the course of commerce, the Ohio Fair Trade Law authorizes an unlawful "organization of the market" at all levels of distribution by state authorized boycott, by unlawful horizontal price-fixing and by the attempted binding of third persons by notice of an unwarranted "proprietary interest" unlawfully created by the Ohio Legislature.

III. The Congress, the Virginia courts and the common law recognize that a "contract" may not be imposed by a "notice statute" upon a non-consenting third party.

A second source for various provisions of the 1959 Ohio Fair Trade Law was the Virginia Fair Trade Act of 1958. Code of Virginia, 1950, as amended, Sections 59-8.1 to 59-8.10. This statute is a "notice" statute. Section 59-8.2(10) defines "contracts" to provide that "acceptance for resale with actual notice shall be deemed to be assent to the terms of the 'contract.' "

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[15] The substance of the first three provisions also appears in variations of the "Quality Stabilization" bills reported on by the House Committee on Interstate and Foreign Commerce. H. Rep. No. 2352, 87th Cong., 1st Sess. (1962); H. Rep. No. 566, 88th Cong. 1st Sess. (1963). These bills retain the "proprietary interest" in the *trade-mark, brand or trade-name,* rather than in the *commodity.*

The Virginia Courts had previously held that the nonsigner clause of the prior Virginia Fair Trade Law was ineffective. *Benrus Watch Co., Inc. v. Kirsch*, 198 Va. 94, 92 S. E. (2d) 384 (1956). Following the enactment of the new statute, the Virginia Courts have held:

1. The "notice contract" statute is valid between trade-mark owner and direct purchaser. *Standard Drug Co., Inc. v. General Electric Co.*, 202 Va. 367, 117 S. E. (2d) 289 (1960).

2. Such a "contract by notice" *cannot* be effective between the trade-mark owner and third parties who acquire merchandise from a third person, e.g., an intervening wholesaler, who made no resale price maintenance contract with the purchaser. Otherwise the invalid nonsigner clause would be reinstituted. *Bulova Watch Company, Inc. v. Zale-Norfolk, Inc.*, No. 2570, Court of Law and Chancery, Norfolk, aff'd without opinion, Supreme Court of Virginia, March 1, 1962, Appendix B, p. 96 hereto.

With specific reference to the Virginia statute, the Congress of the United States has recognized that such a "contract by notice" statute under the federal enabling legislation is ineffective unless the McGuire Act be amended to permit resale price maintenance by "notice" as well as by "contract or agreement." The Harris Bill proposed such amendments to Section 5(a) (2), (3) and (4) of the McGuire Act. H. Rep. 467, Eighty-sixth Cong., First Sess. (1959) at 18.

The view of the Virginia Courts is in accord with the common law. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901).

IV. The Ohio Fair Trade Law frustrates the basic national policy expressed in the Lanham Act by creating a "proprietary interest" in a trade mark on goods in commerce, and the basic national policy expressed in the Federal Food, Drug, and Cosmetic Act by authorizing the removal of labels on drugs in commerce.

The Ohio Fair Trade Law frustrates basic national policy by creating a "proprietary interest" in a trade-mark on goods in interstate commerce. Such a "proprietary interest" is basic to the operation of the Ohio "implied contract" theory of fair trade law, approved by the Supreme Court of Ohio in this case. (R. 417, 418, 423.)

Such an interference with trade-marks in commerce is contrary to the federal preemption of trademarks in commerce, expressed by Congress in the Lanham Act.[16]

The 1959 Ohio law also creates a defense to the attempted enforcement of a fair trade contract by permitting the removal of a trade-mark (Section 1333.33 (D)). Such a removal is contrary to the national policy expressed by the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C., Section 331(k), 67 Stat. 631.[17]

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[16] 15 U. S. C. Section 1127, 60 Stat. 44, Lanham Act, states in part:

"The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation. * * *"

[17] "The following acts and causing thereof are prohibited:

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

V. The Upjohn Company has "organized the market" for the distribution of its products in the course of commerce in the State of Ohio in an unlawful pattern on the basis of an unlawful statute.

A. *Noncontracting Retailers.* Upjohn has given "notice" to retailers like appellant that it has established minimum or "fair trade" prices for its products (R. 27).

B. *Contracting Retailers.* The Contracting retailers have signed contracts drawn by reference to Section 1333.28(I). The contract recites the retention by Upjohn of an interest in the "good will and public acceptance of the products bearing its trademarks, brands or names * * * so long as commodities bearing its trademarks, brands or names are offered for sale in commerce," (R. 25). Upjohn and the retailer agree that "Retailer may enjoy the benefit of the good will symbolized thereby by referring to said trademarks, brands or names in the promotion of sale of said commodities by Retailer." (R. 25.)

C. *Wholesalers.* Upjohn has organized price maintenance at the wholesale level either by notice to wholesalers (R. 95-96), or by *del credere* agency arrangement (R. 105-108). Such arrangements have been made with McKesson and Robbins, Inc., a manufacturer of "proprietary drugs" (R. 184) and also a competing wholesaler of Upjohn in drug sales to pharmacies of Upjohn products (R. 89). Such arrangements appear to violate both Section 5(a)(5) of the McGuire Act and the principles enunciated in *United States v. Masonite Corp.*, 316 U. S. 265 (1942).

VI. The Upjohn "notice contract" with appellant violates Section 1 of the Sherman Act.

The Upjohn resale price maintenance structure in Ohio originates and finds its place in an unlawful statutory scheme which is wholly beyond the federally authorized scope of state fair trade enabling legislation. The scheme originates in an impermissible "proprietary interest" retention upon commodities in commerce, which is sought to be combined with an impermissible "notice contract."

The Ohio legislation seeks to renounce the "contract or agreement" system created by the Miller-Tydings and McGuire Acts. It seeks to solve for "fair traders" the marketing problems they felt were generated by the decisions of this Court and of State Supreme Courts. In the interest of this "orderly," price-controlled fair trading at all levels of distribution, the Ohio Legislature has authorized contracts or arrangements totally at variance with basic antitrust objectives, to wit, horizontal price-fixing among competitors, and boycotts and combinations designed to keep merchandise from "discounters."

The "contract by notice" sought to be enforced by Upjohn against appellant violates Section 1 of the Sherman Act. It is given pursuant to an Ohio statute which violates the Supremacy Clause.

VII. The 1959 Ohio Fair Trade Law accomplishes a deprivation of due process under the Fourteenth Amendment by reason of an uncontrolled and arbitrary delegation of power over the property and business lives of others without any procedural safeguards.

The theory of the Harris Bills, incorporated into the Ohio law, was that a "proprietary interest" was to be retained by the proprietor *in the fair-traded commodity*. What was proposed by these Bills to be accomplished

by Act of Congress under the "commerce clause," the State of Ohio has attempted to accomplish by Act of Legislature.

The retention of the "proprietary interest" in the commodity by the "proprietor" is made mandatory by the terms of Section 1333.31 so long as the commodity is identified by the trade-mark or trade name of the proprietor." [18] The mandatory definition, moreover, encompasses every trade name or trade-mark of the "proprietor," whether he be a "sham" or "token enforcer" of resale price maintenance[19] or a vigorous enforcer; or whether the trade-mark or trade name be "strong" or "weak" or "misleading" or the subject of pending injunction or cancellation proceedings, etc.

The "proprietary interest" is given life, however, only upon the arbitrary decision of the "proprietor" to "fair-trade" the commodity. The "proprietary interest" ceases upon the unilateral decision of the "fair-trader" to abandon resale price maintenance.

The proprietor's decision upon the retention of a "proprietary interest" is matched by the unilateral power given by the statute to the trade-mark owner over the business life of others. By Section 1333.29 (B) (1), (2), and (3), in his sole unfettered discretion, the "proprietor" can by notice or contract deputize and compel every person in his distribution system to assist in the enforcement of fair trade prices, both inside and outside of Ohio by controlling

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[18] Section 1333.31 provides:

"A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

[19] Note: *The Operation of Fair Trade Programs* (1955), 69 Harv. L. Rev. 316, 331-332.

the identity of the persons to whom an Ohio distributor may resell. The stream of interstate and intrastate commerce at wholesale and retail levels may be effectively dammed up unless resale is effected within lines demarcated by the proprietor, i.e.:

(a) resale by the initial vendee at the fair trade price for his particular level of distribution; and

(b) resale to subsequent vendees who observe fair trade at their respective levels of distribution; and who will in turn require observance by their subsequent vendees.

In *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183 (1936), the statute before this Court permitted only resale price maintenance. This Court held that such a statute does not unlawfully delegate legislative authority, nor does it violate due process.

The conferring by the State of Ohio of an unrestrained discretion upon "proprietors" over the business life of others in the use of their property, in addition to the control of the resale price, clearly constitutes an unlawful delegation of legislation to private persons without any procedural safeguards or standards whatsoever. In so doing, the State of Ohio has violated the rights of appellant under the Due Process Clause of the Fourteenth Amendment. *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U. S. 116, 121 (1928); *Carter v. Carter Coal Co.*, 298 U. S. 238, 311 (1936); Note, *Delegation of Power to Private Parties*, 37 Colum. L. Rev. 447, 458 (1937); Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 217 (1938). *Cf. Silver v. New York Stock Exchange*, 373 U. S. 341, 364-366 (1963).

Since so many Courts in recent years have declined to give effect to the reasoning and philosophy of the *Old Dearborn* case, *supra*, it is urged that this Court reconsider its views in that case.

SOURCES OF VARIOUS PROVISIONS OF 1959 OHIO FAIR TRADE LAW

Ohio Rev. Code §§ 1333.27-1333.34	MacLachlan Proposal	Harris Bill H. R. 10527 85th Cong. 2d Sess.	Virginia Law (June 27, 1958) (§§ 59-8.1 to 59-8.10, Code of Virginia, 1950 as Amended)	Harris Bill H. R. 1253 86th Cong., 1st Sess. H. Rep. No. 467
Recital of Purpose of Maintaining prices at all "appropriate stages" of distribution § 1333.27(B)				H. Rep. No. 467 86th Cong., 1st Sess. at 16
"Proprietor" § 1333.28(A)	§ 2	§ 5		§ 5(A)
"Proprietary Interest" § 1333.31	§ 2	§ 5		§ 5(B)
"Contract" § 1333.28(I)			Defined to Include Notice § 59-8.2(10)	
Consideration § 1333.28(I)				
Acquisition of Commodity with Notice	§ 2	§ 5		§ 7
"Notice" § 1333.28(J)	§ 2	§ 5		§ 5(C)
Methods of Conveying Notice, e.g., by mail, notice on merchandise, containers, actual notice; notice that price is subject to change (§ 1333.30)	§ 2	§ 5		
Establishment of Resale Prices by contract or by notice (§ 1333.29)	§ 3 (Notice only)	§ 5 (Notice only)		§ 6 (Notice only)
Differentiation of Prices at levels of distribution § 1333.29(A)	§ 3	§ 5		§ 6
Establishment of Wholesale and Retail Prices although Proprietor Competes with Wholesaler § 1333.29(A)	§ 3	§ 5		§ 6
Buyer will not resell at less than minimum price for his level of distribution § 1333.29(B)	§ 3	§ 5		
Buyer will require distributor to get resale price agreement of every other distributor, plus agreement to get an agreement § 1333.29(B)				
Seller will require from any other distrib-			§59-8.3 (c) (1)	

"Proprietary Interest" § 1333.31	§ 2	§ 5		§ 5(B)
"Contract" § 1333.28(I)			Defined to Include Notice § 59-8.2(10)	
Consideration § 1333.28(I)				
Acquisition of Commodity with Notice	§ 2	§ 5		§ 7
"Notice" § 1333.28(J)	§ 2	§ 5		§ 5(C)
Methods of Conveying Notice, e.g., by mail, notice on merchandise, containers, actual notice; notice that price is subject to change (§ 1333.30)	§ 2	§ 5		
Establishment of Resale Prices by contract or by notice (§ 1333.29)	§ 3 (Notice only)	§ 5 (Notice only)		§ 6 (Notice only)
Differentiation of Prices at levels of distribution § 1333.29(A)	§ 3	§ 5		§ 6
Establishment of Wholesale and Retail Prices although Proprietor Competes with Wholesaler § 1333.29(A)	§ 3	§ 5		§ 6
Buyer will not resell at less than minimum price for his level of distribution § 1333.29(B)	§ 3	§ 5		
Buyer will require distributor to get resale price agreement of every other distributor, plus agreement to get an agreement § 1333.29(B)				
Seller will require from any other distributor (a) no resale at less than price stipulated for distributor's level of distribution, (b) distributor will require same agreement from another distributor to whom he may resell § 1333.29(B)			§59-8.3 (c) (1)	
Third Party Beneficiary Provision in favor of Proprietor and any distributors bound by similar contract or notice § 1333.29(C)				
Permissible Removal of Trade Mark § 1333.33(D)				
Horizontal Price fixing prohibited except as permitted in § 1333.29			§ 59-8.10	
Cooperation by Distributors with Proprietor expressly or impliedly authorized 1333.29(B)	§7 (Express Provision)			§ 10 (By implication)

ARGUMENT.

I. By reason of the historic illegality of price fixing, the history of "fair trade" legislation is one of reluctance to create or extend the exemption from the antitrust laws for private price fixing in commerce.

1. The history of resale price maintenance legislation has been characterized by stormy and turbulent advocacy and opposition. "Few subjects of direct concern to business—both small and large—engender more acrid controversy than that of fair trade." Report of Senate Select Committee on Small Business on Fair Trade, Sen. Rep. No. 2819, Eighty-fourth Cong., 2d Sess. (1956) 1.

Although demands for Federal legislation covering articles sold in interstate commerce took form in 1912 shortly after this Court rendered its decision in the *Miles Medical* case, 220 U. S. 373 (1911), it was twenty-five years before an enabling act was passed by the Congress—and then only after the Miller-Tydings Bill was attached as a rider to a District of Columbia Appropriation Bill.[20]

When the McGuire Act was before the Congress, it was reported out of the Senate Committee on Interstate

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[20] S. Rep. 879, 75th Cong., 1st Sess., Report to accompany H. R. 7472, July 6, 1937, Providing Additional Revenue for the District of Columbia, p. 5; 81 Cong. Rec. 7486-7487. The bitterness of the division over the legislation clearly appears in the historic Senate debate. 81 Cong. Rec. 7488-7497. The extended history of the first twenty-five years of legislative effort is recounted in *Schwegmann Bros. vs. Calvert Distillers Corp.*, 341 U. S. 384 (1951); Federal Trade Commission, Report on Resale Price Maintenance (1945) 36-66. Neither the eloquence nor appearances of Mr. Louis Dembitz Brandeis could move the Congress to enact resale price maintenance legislation, let alone still controversy in the Committee. Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 13305 (Stevens Bill), 63d Cong., 2d and 3d Sess. (1915), reproduced in *Hearings Before the House Committee on Interstate and Foreign Commerce on H. R. 11* (Capper-Kelly) Sixty-ninth Cong., First Sess. at 80 *et seq.*, esp. 116-117.

and Foreign Commerce without recommendation. Sen. Rep. No. 1741, Eighty-second Cong., First Sess. (1952). The debate upon the McGuire Act was long and hard, both in the House and the Senate.[21] In the House of Representatives, the debate was characterized by a three way conflict: among opponents and proponents of any legislation; and by a jurisdictional conflict between the House Judiciary Committee and the House Committee on Interstate and Foreign Commerce. The conflict between the Committees of the House revolved about the best method of amending the Miller-Tydings Act.[22] The upshot of the long, searching

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[21] 98 Cong. Rec., Part 4, 82d Cong., 2d Sess., pp. 4896-4926; 4933-4956 (House of Representatives); 98 Cong. Rec., Part 7, 82d Cong., 2d Sess., pp. 8716-8748; 8819-8858; 8865-8873; 8881-8892. (Senate.) The debate was preceded by an extensive Report on "Fair Trade: The Problem and the Issues" by the Select Committee on Small Business, H. Rep. No. 1292, 82d Cong., 2d Sess. (1952), in which the Committee stated its belief (p. 1) that "the states should retain jurisdiction over retail trade practices and that Congress should make it possible to enforce fair trade contracts in interstate commerce." In H. Rep. No. 1437 on H. R. 5767, 82d Cong., 2d Sess., the Committee on Interstate and Foreign Commerce recommended passage of the measure.

[22] 98 Cong. Rec., Part 4, 82nd Cong., 2d Sess., *esp.* 4934-4956. The conflict in debate in 1952, and the careful scrutiny of the McGuire Act are reflected in the 1959 Fair Trade Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives. 86 Cong., 1st Sess., H. R. 1253 (Harris Bill). Mr. John W. Anderson, President, American Fair Trade Association and President, Quality Brands Association of America, Inc., stated 652 to 653:

> "We had some doubts about the Miller-Tydings Act, for reasons that should not be discussed here, and those doubts were proved well founded when the courts later virtually disabled the Miller-Tydings Act.
>
> "Then a new act became necessary, and the McGuire bill was presented by the druggists; The American Fair Trade Council being not satisfied with the structure of the McGuire bill, presented the Keogh bill, which was referred to the committee that deals with trademarks, the Judiciary, Congressman Celler's Committee.

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debate was a close, careful scrutiny of the McGuire Act both in principle, and word for word.

There would not appear to be room for argument that Congress intended a "liberal" construction to be given

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"This Commerce Committee before which I speak, showed no preference for the Keogh legislative text and (sic) adopted it verbatim except that section 4, a new section 4, was substituted for section D of the Keogh text. Our section D was intended to prevent the invasion of a fair-trade State from across its borders by cut prices. We were told and assured—and there is overwhelming documentation, I might say, of the fact that everybody was assured by sponsors of the original draft of the McGuire bill, that the new section 4 would hold against that interstate discounting. We of AFTC could not believe it would.

"There was prepared in a conference in which the druggists and the beverage industries and the diversified fair-trading industries were represented, what came to be known as the hometown amendment, and all present agreed to support that amendment to cure the doubt. At least, that existed as to whether section 4 would hold. That support was not given and the amendment was defeated.

"Section 4, when it finally came to a Federal court test, was destroyed. And thereupon the floodgates were open. Fair-trade States were invaded by discounters of all kinds, mail order and what-not, and we believe that that cruel invasion of fair-trade States that had non-signer clauses which bound nonsigners to the fair-trade prices on these popular products—the fact that they were bound there to fair-trade prices while they were destroyed or seriously injured by the invasion of price cutters—we feel that that fact influenced State courts to find some reason for destroying the nonsigner clause.

"And as you men know, in many States that nonsigner clause was destroyed in the manner and for the reasons the American Fair Trade Council predicted it would be.

"I am not going to burden this record with documentation supporting those statements, but if it is desired at any time, I shall be happy to supply it.

"Now, as I say, the Keogh bill was to be moved over verbatim under the McGuire head. And I thought that was a fine idea until I saw how the bill had been altered. And so, as a result, the McGuire Act failed our economy, failed the reseller, failed the manufacturer, and failed the public. It became necessary then for the third time to have a new act. Now, with two strikes on us, we again face this honorable committee."

either the Miller-Tydings Act or the McGuire Act.[23] The purpose of the McGuire Act was merely to "shore up" the non-signer contract provisions in the state fair trade legislation enacted pursuant to Miller-Tydings. The strict construction generally given exemptions from the antitrust laws and, more specifically the exemption for resale price maintenance, accords with the history of such legislation.

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[23] While the debate in the House contains references to the desirability of free operation of state policy in resale price maintenance, 98 Cong. Rec. 4901 (1952) (remarks of the Sponsor, Rep. McGuire) the purpose and intent of the McGuire Act was limited. As stated by Rep. Priest, Chairman of the House Interstate and Foreign Commerce Subcommittee which considered and reported on the McGuire Bill:

> "We concluded in the Committee on Interstate and Foreign Commerce that the best approach was to pass legislation *permitting, mind you, permitting the State fair-trade laws that have been enacted* and adopted by the States to be operative and to be effective without constituting a burden on interstate commerce." 98 Cong. Rec. 4936. (Italics added.)

The Sponsor of the measure, Mr. McGuire, stated:

> "The McGuire bill adds no new powers to the Federal Trade Commission Act. It merely exempts from the Federal Trade Commission Act and the Antitrust Acts so far as interstate commerce is concerned *that type of resale price maintenance contract which is permitted by the fair-trade acts of 45 States.*" 98 Cong. Rec. 4900-4901. (Italics added.)

Rep. Harris, the next senior majority member of Mr. Priest's Subcommittee stated:

> "The Supreme Court of the United States, however, held—*and that is what we are here to correct today—that the Miller-Tydings Act applied only to those who were parties to the contract.* The majority of the court held that in nonsigner cases, the Miller-Tydings Act did not apply.
>
> About the same time, another problem arose with reference to articles which cross State lines in the course of a retail sale. That case came from Pennsylvania—the Wentling case. The court of appeals said that the fair-trade law of the State of Pennsylvania could not apply to articles which were sent across Pennsylvania State boundaries into other States.

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Although many resale price maintenance bills have been introduced into the Congress since the enactment of the McGuire Amendment to the Federal Trade Commerce Act, none has passed, and all have encountered powerful opposition.[24] The Department of Justice and the Federal Trade Commission have opposed resale price maintenance legislation; and they have been joined in such opposition by the American Bar Association, among others.

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As a consequence of these decisions we bring the McGuire Bill to you today." 98 Cong. Rec. 4913. (Italics added.)

Rep. Dolliver, the ranking minority member of the Subcommittee, stated:

"*The whole purpose of these bills that are now before us, or at least the main purpose, is to correct those decisions that were made by the courts,* so that the States in question if they decide so to do may sustain and have in their respective jurisdictions vertical retail price fixing." 98 Cong. Rec. 4900. (Italics added.)

In the Senate, Senator Humphrey, the spokesman for the measure, stated:

"The pending bill changes no Federal policy. *It changes no State law. It adds nothing whatsoever new to the fair-trade policy.* It has only one purpose, namely, to clarify a law which the Supreme Court found, by a split decision, not to cover certain practices.

Therefore, Mr. President, the purpose of the pending bill is only to plug the loopholes in the Federal Miller-Tydings Act, which is a measure to enable the States to carry out fair-trade practices." 98 Cong. Rec. 8819. (Italics added.)

The purpose of the McGuire Act to overturn the Schwegmann and Wentling decisions and the limited scope of the statute are generally understood. The National Wholesale Druggists' Association, *The Basis and Development of Fair Trade* (3rd Ed., 1955) at 12, 91.

[24] Hearings on such legislation have been held in recent years as follows: *Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-fifth Congress,* Second Session on H. R. 10527, H. R. 10770, H. R. 10847, H. R. 11048, H. R. 11216, and H. R. 11264, April 29, 30, May 1, 6, and 7, 1958; *Hearings Before the*

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The highest courts of twenty-four states, have, in one manner or another, declared their nonsigner fair trade provisions unconstitutional. Four states and the District of Columbia have never enacted fair trade laws. Both by state court and federal decision, the enforcement of exist-

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Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-sixth Congress, First Session on H. R. 768, H. R. 1253, H. R. 2463, H. R. 2729, H. R. 3187, H. R. 5252, and H. R. 5602, March 16, 17, 18, 19, 20, 23, 24, and 25, 1959; *Hearings Before a Special Subcommittee on Fair Trade of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-sixth Congress*, First Session on S. 1083, June 15, 16, and July 10, 1959; *Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-seventh Congress*, Second Session on H. J. Res. 636, H. J. Res. 637, H. J. Res. 639, H. J. Res. 679, H. R. 10335, H. R. 10340, H. R. 10517, H. R. 11227, H. R. 11346 and H. R. 11778, June 11, 12, 13, 14, 15, 1962; *Hearings on S. J. Res. 159 before a Subcommittee of the Senate Committee on Commerce, Eighty-seventh Cong.*, Second Sess. (1962); *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-eight Congress*, First Session on H. R. 3669, April 23, 24, 25, 26; May 14 and 15, 1963.

In addition, hearings were held before a Subcommittee of the Select Committee on Small Business, United States Senate, Eighty-fifth Congress, Second Session on *Competitive Impact of Discount House Operations on Small Business*, June 23, 24, and 25, 1958.

Both the Harris Bill and the Quality Stabilization Bill have been reported favorably by the Committee on Interstate and Foreign Commerce of the House of Representatives, H. Rep. No. 467, Eighty-sixth Cong., First Session, on H. R. 1253, June 9, 1959 ("Harris Bill"); H. Rep. No. 2352 on H. J. Res. 636, 87th Cong., 2nd Sess. (1962) ("Quality Stabilization"); H. Rep. No. 566, Eighty-eighth Congress, First Session, on H. R. 3669, July 22, 1963 ("Quality Stabilization Bill").

Hearings on the pending "Quality Stabilization" legislation, S. 774, before the Special Subcommittee on Quality Stabilization of the Committee on Commerce of the United States Senate have been in progress during the current session. In the present Congress, a host of bills have been introduced into the House relating to "Quality Stabilization" and fair trade. Weston, *Fair Trade Alias "Quality Stabilization": Status, Problems and Prospects* (1963) 22 ABA Antitrust Section: Vertical Arrangements 76, 96, nn. 92, 93.

ing fair trade legislation has been made difficult. H. Rep. No. 566, Eighty-eighth Cong., First Sess. (1963) at 5; Alexander, *Quality Stabilization and the Crisis in Fair Trade* (1963) 51 Georgetown L. J. 783-795.

2. Upjohn drugs and pharmaceuticals sold by retail pharmacies over the counter and by prescription are "in the stream" of interstate commerce. *Cf. Northern California Pharmaceutical Assn. v. United States*, 306 F. 2d 379 (C. A. 9, 1962), *cert. den.*, 371 U. S. 862 (1962); *United States v. Utah Pharmaceutical Assn.*, 201 F. Supp. 29 (D. Utah, 1962). Over 90% of the prescriptions sold are dispensed by the pharmacists as precompounded by the manufacturer, without any significant change in form. 306 F. 2d at 386; 201 F. Supp. at 33.

3. In *White Motor Company v. United States*, 372 U. S. 253, 260 (1963), this Court reiterated the historic premise that:

> "Price-fixing arrangements, both vertical (*United States v. Parke, Davis & Co.*, 362 U. S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505; *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502) and horizontal (*United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219), are per se violations of the antitrust laws * * *."

In *White Motor*, this Court also reiterated (372 U. S. at 260) that:

> "In any price-fixing case, restrictive practices ancillary to the price-fixing scheme are also quite properly restrained. Such was *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 64 S. Ct. 805, 88 L. Ed. 1024, where price fixing was 'an integral part of the whole distribution system,' including customer restrictions."

4. Exemptions from the antitrust laws for price fixing "contracts or agreements" in interstate commerce pursuant to enabling legislation authorized by the Miller-Tydings and the McGuire Acts are in derogation of the fundamental national policy expressed in the antitrust laws and have been strictly construed. In *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305, 316 (1956), this Court held that:

> "* * * Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

Accord: *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 388; *General Electric Co. v. Masters Mail Order Co. of Washington, D. C., Inc.*, 244 F. 2d 681, 683 (C. A. 2d, 1957), *cert. den.* 355 U. S. 824 (1957).

5. This Court has consistently held that exemptions, which are specific exceptions to the general command of the antitrust laws, should be narrowly construed and applied only where any conditions for exemption are clearly satisfied. Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA Antitrust Section: Regulated and Exempt Industries (1961) 313, 327. This Court has continued to hold that repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of "plain repugnancy between the antitrust laws and the regulatory provisions." *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963).

6. Where the fair trade transaction involves interstate commerce, the fair trade contract must comply with the federal fair trade enabling legislation as well as the

state or local fair trade acts in order for the transaction to be exempted from the Federal antitrust laws. "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, at 386 (1951). "* * * When a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. Parker v. Brown, 317 U. S. 341, 350 (1943)." *Ibid*, at 389.

Differences between the federal enabling legislation and state or local acts, reflected in a fair trade contract drawn pursuant to the nonconforming local act, will remove the federal exemption for the fair trade contract. "A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act." *United States vs. Bausch and Lomb Co.*, 321 U. S. 707, 721 (1944).

7. Moreover, state legislation enacted pursuant to permissive enabling federal legislation must be *of the kind* contemplated by the Congress before exemption from federal regulation may be accomplished. *F. T. C. vs. Travelers Health Assn.*, 362 U. S. 293 (1960); *Grand Jury Investigation of Aviation Insurance Industry*, 183 F. Supp. 374 (S. D. N. Y., 1960).

II. The Ohio law exceeds any permissible limits of Federal Enabling Legislation. Its provisions are derived from proposed Congressional "proprietary interest" national fair trade legislation, formulated and intended to supersede the Miller-Tydings and McGuire Act systems of state enabling legislation for resale price maintenance "contracts or agreements."

A. The McGuire Act was enacted to give validity to non-signer provisions of state fair trade legislation.

Schwegmann Bros. vs. Calvert Distillers Corp., 341 U. S. 384 (1951), held that the Miller-Tydings amendment did not make binding upon nonsigners resale prices fixed in contracts under state fair trade laws.

In the course of its Opinion, this Court noted that "had Congress desired to eliminate the consensual element from resale price fixing by a single contract binding by 'coercion' upon nonsigners, *either* a nonsigner provision would have been included *or* resale price fixing would have been authorized without more." 341 U. S. at 390.

In amending the federal enabling legislation to undo the result in *Schwegmann* by the McGuire Act, Congress did not authorize "resale price fixing * * * without more." In the "normal and customary meaning" of words (341 U. S. at 388), Congress authorized only state enabling legislation for price fixing "contracts or agreements." [25]

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[25] The McGuire Act also provided that neither "the making of contracts or agreements" pursuant to state fair trade laws nor the enforcement thereof shall constitute an unlawful burden on interstate commerce. Section 5(a)(4). The purpose of this provision was to remove any obstacle in the way of an application of state fair trade laws to retail transactions or advertising originating in a fair trade state but crossing state lines. Such an obstacle had been suggested in *Sunbeam Corporation v. Wentling*, 185 F. 2d 903 (CA 3d, 1950), *cert. granted, judgment vacated and remanded* (341 U. S. 944 (1951)) *for consideration in the light of the Schwegmann case.*

B. By the end of 1957, the "contract or agreement" approach of Miller-Tydings and McGuire had broken down.

By the end of 1957, it was the opinion of proponents of fair trade that resale price maintentance by means of a federally enabled system of state authorized "contracts or agreements" had failed. In the numerous hearings since 1958, the Congress was made acquainted with, and its Committee Reports from 1959 to date acknowledge the breakdown of resale price maintenance by "contract or agreement." [26] The reasons given by the proponents of the new legislation for the failure of Miller-Tydings and McGuire were at least four-fold: [27]

(a) In many states, the nonsigner clause of state "fair trade" laws had been declared unconstitutional; other states had declared their entire fair trade laws invalid; four states and the District of Columbia had no such laws. H. Rep. No. 467, Eighty-sixth Congress, First Session to accompany H. R. 1253 (Harris Bill) June 19, 1959, 6.

(b) This Court in *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956) held invalid, pursuant to Section 5(a)(5) of the McGuire Act, price fixing "contracts or agreements" of a drug manufacturer and wholesalers of the manufacturer's products where the manufacturer was also a competing wholesaler. The ruling in the *McKesson* case was regarded as a further blow to fair

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[26] *Supra*, note 24; H. Rep. No. 467, 86th Cong., 1st Sess. (1959) 4-7; H. Rep. No. 2352, 87th Cong., 2d Sess. (1962) 6-9; H. Rep. No. 566, 88th Cong., 1st Sess. (1963) 3-6.

[27] E.g., Statement of Herman T. VanMell, Vice President and General Counsel, Sunbeam Corporation, *Hearings on Competitive Impact of Discount House Operations on Small Business*, 85th Congress, 2nd Session (1958), 417-421; Testimony of Herman S. Waller, Counsel, National Association of Retail Druggists, *Hearings on H. R. 10527 ("Harris Bill"), etc.*, 85th Congress, 2nd Session, pages 540 to 563.

trade, since it inhibited the "orderly marketing of goods" at the wholesale level. *E.g.*, Testimony of Herman S. Waller, Counsel, National Association of Retail Druggists, Hearings, *supra* note 27, 548.

(c) *General Electric Co. vs. Masters Mail Order Co. of Washington, D. C., Inc.*, 244 F. 2d 681 (CA 2d, 1957), *cert. den.*, 355 U. S. 824 (1957), held lawful the establishment by a retailer doing business in a fair trade state of an office in a nonfair trade jurisdiction, and the sale of merchandise below the fair trade price by means of the parties to the sale agreeing to the passage of title in the nonfair trade jurisdiction. H. Rep. No. 467, 86th Congress, First Session to accompany H. R. 1253 (Harris Bill), June 19, 1959, 7.

(d) Additional reasons given at various Hearings for the crippling of fair trade arose out of the enforcement by the Department of Justice of the settled rule of antitrust law that a boycott, or cooperative or combined efforts may not lawfully be utilized to institute, maintain or extend pricing systems in commerce. *United States vs. Frankfort Distillers, Inc.*, 324 U. S. 293 (1945); *United States vs. Parke, Davis & Co.*, 362 U. S. 29 (1960).[28]

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[28] Consent decrees have recently been entered against a number of pharmaceutical associations prohibiting price activity by horizontal arrangement. *U. S. v. Nassau-Suffolk Pharmaceutical Society, Inc.*, 1963 Tr. Cas., Par. 70,937 (E. D. New York, 1963) ("drug products or related goods"); *U. S. v. Ibid.*, Par. 70,396 (E. D. New York, 1963) ("prescription drugs or professional services"); *U. S. v. Hawaii Retail Druggists Assn.*, 1963 Tr. Cas., Par. 70,914 (D. Hawaii, 1963), ("any drug product or related goods"); *U. S. v. Arizona Pharmaceutical Assn. et al.*, 1963 Tr. Cas., Par. 70,614 (D. Arizona, 1963), ("prescription drugs"); *U. S. v. Idaho State Pharmaceutical Assn., Inc.*, 1963 Tr. Cas., Par. 70,689 (D. Idaho, 1963), ("prescription drugs"); *U. S. v. Northern California Pharmaceutical Assn.*, 1963 Tr. Cas., Par. 70,690 (N. D. California, 1963) ("prescription drugs").

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C. The proposals to cure the breakdown of the Congressional enabling legislation sought to give relief from the "contract or agreement" approach to fair trade.

The hearings in the Ohio Legislature on the 1959 Fair Trade Act were held before the House Judiciary Committee on April 15, April 23, April 29, and May 28, 1959, and before the Senate Judiciary Committee on June 4, and June 9, 1959 (R. 161-366). Between January 11, 1958, the date of the declaration of unconstitutionality of the 1936 Ohio Fair Trade Law, and the conclusion of the hearings before the Senate Judiciary Committee of the Ohio Legislature on June 9, 1959, the draftsmen of the new Ohio Fair Trade Legislation had available to them at least the following materials:

1. MacLachlan, *A New Approach to Resale Price Maintenance* (1957) 11 Vanderbilt L. Rev. 145.

2. *H. Rep. Hearings on H. R. 10527*, Eighty-fifth Cong., Second Sess. (introduced by Representative Harris), etc., April 29, 30, May 1, 6, and 7, 1958.

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The decree in the *Nassau-Suffolk Pharmaceutical* case, 1963 Tr. Cas., Par. 70,937, 78,735 provides:

"Defendant Nassau-Suffolk Pharmaceutical Society, Inc., is hereby enjoined and restrained from directly or indirectly:

* * *

(E) Advocating, suggesting, urging, inducing, compelling, coercing or in any other manner influencing or attempting to influence any manufacturer *to enforce fair trade prices* for the products of such manufacturer;

(F) *Notifying or otherwise advising any manufacturer of sales of its products at less than fair trade prices or threatening, warning or advising any druggist that it will do so;*

(G) *Instigating or instituting lawsuits to maintain fair trade prices,* recommending or suggesting attorneys or paying legal fees or expenses or collecting evidence therefor, or threatening or warning any druggist that it will do so." (Italics added.)

3. *Hearings on Competitive Impact of Discount House Operations on Small Business*, Eighty-fifth Cong., Second Sess., June 23, 24 and 25, 1958.

4. Enactment of Virginia Fair Trade Law, Virginia Acts of Assembly, 1958, Chapter 259, Approved March 8, 1958, effective June 27, 1958. (Code of Virginia, as amended, Sections 59-8.1 to 59-8.10.)

5. *H. Rep. Hearings on H. R. 1253* (introduced by Representative Harris), etc., Eighty-sixth Cong., First Sess., March 16, 17, 18, 19, 20, 23, 24, and 25, 1959.

6. *Senate Hearings on S. 1083* (Humphrey-Proxmire Bill, same as H. R. 1253), Eighty-sixth Cong., First Sess., June 15, and 16, July 10, 1959.

The conception of the retention of a "proprietary interest" in merchandise identified by the trade-mark of a "proprietor" was originated by Professor James A. MacLachlan in *A New Approach To Resale Price Maintenance* (1957), 11 Vanderbilt L. Rev. 145. The bill suggested by Professor MacLachlan was devised at the request of proponents of resale price maintenance who "requested advice on * * * whether their case merited a fresh legal approach: Professor MacLachlan's objectives (11 Vanderbilt L. Rev. 146-147) were to formulate a *national* fair trade law, not merely an enabling act, and thereby:

a. Withdraw the word "fair" from the resale price maintenance controversy;

b. "More fundamentally," clarify issues "by renouncing the device of the nonsigner clause. *Where antagonism is not aroused by the use of the Fair Trade label, it can flow from a sense of outrage at holding a man to a contract he never made.*"

In "such a matter of national concern, Congress should take the lead in determining national policy." (11 *Vanderbilt L. Rev.* at 147).

Before the Congress, Professor MacLachlan took responsibility for drawing up the first Harris Bill. (Hearings on H. R. 10527, etc. (1958), Eighty-fifth Cong., Second Sess. 267.) He also stated that *"this bill does not proceed upon a contract theory, so nobody is going to be held for a contract he did not sign." Ibid.*, at 263.

In order to overcome the failure of the "contract or agreement" system, binding upon nonsigners, the bill had the fundamental objective of permitting the proprietor to organize the market "at the various stages of distribution," and in co-operation with his distributors. (11 *Vanderbilt L. Rev.* at 151).

D. The Ohio law derives from proposed national fair trade legislation.

The proposed 1958 and 1959 Congressional legislation and the Ohio Fair Trade Law of 1959 were drafted in order to "by-pass" the entire "contract or agreement" method of establishing and maintaining resale prices. The Ohio Legislative proceedings which produced the 1959 Act (R. 193-366) ignored the hard-fought and "acrid" history of the Federal legislation. The Ohio Legislature therefore readily approved a departure in fair trade law which made every "distributor" with "notice" a "contractor."

1. The minority of the Supreme Court of Ohio has held that the "heart of the new Act" is the theory of implied contract. (R. 415.) The subject matter of the implied contract is the "proprietary interest" devised for enactment *by the Congress* by the Harris

and "Quality Stabilization" bills. The minority of the Supreme Court of Ohio found that a valid "proprietary interest" on goods in commerce may be retained by the proprietor *by fiat of the Ohio Legislature*. The "proprietary interest" thus created and authorized may, in the opinion of the minority of the Ohio Supreme Court (R. 418), be "appropriated" like a candy bar.

As will be argued more fully hereinafter, the State of Ohio appears to have taken over the role and powers of Congress in our Federal System.

2. Section 5(a)(5) of the McGuire Act and the parallel provision of the Miller-Tydings Act prohibit horizontal price fixing. The MacLachlan proposal and the Harris Bill proposed to amend Section 5(a)(5) to overturn *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956).

By Section 1333.29(A),[29] the Ohio law specifically authorizes what Section 5(a)(5) of the McGuire Act prohibits.

3. The MacLachlan proposal and the Harris Bills expressly or impliedly authorized cooperation among distributors and proprietors to maintain the resale price.[30]

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[29] "A proprietor may * * * establish such minimum resale prices for his wholesale distributors, notwithstanding Section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales."

[30] The first Harris Bill provided:

"* * * All distributors of the merchandise of the same proprietor sold under the same mark or name may cooperate with him in maintaining the stipulated or minimum prices estab-

(Continued on following page)

In the interest of the "orderly marketing of goods" by means of resale price maintenance, the Ohio law authorizes proprietors, by contracts or notices, to require "horizontal" cooperation among distributors. Section 1333.29(B).[31] The "proprietor," by virtue of his "proprietary interest" is thereby enabled to keep fair traded goods only within the grasp of those who will agree to observe the resale price.

The "horizontal" cooperative efforts authorized by Section 1333.29(B) frustrate the aims and objectives of the framers of the Miller-Tydings and McGuire Acts which authorize only *vertical* resale price-fixing.[32]

(Continued from preceding page)

lished by him, or his sole distributor specifically authorized for that purpose, and no such cooperation shall constitute an unreasonable or unlawful contract or combination in restraint of trade." *Hearings on H. R. 10527, (Harris Bill) etc.*, (1958), Eighty-fifth Congress, Second Session, at 5. The second Harris Bill narrowly interpreted the ruling of this Court in *McKesson*. H. Rep. No. 467, Eighty-sixth Cong., First Sess. (1959) 19.

[31] Section 1333.29 provides in part:

"(B) Any such *contract or notice* may contain the following provisions:

(2) That the *buyer* will require from any distributor to whom he may resell such commodity an agreement that such *distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;*

(3) That the *seller* will require from any other distributor to whom he may sell other items of such commodity an agreement that *such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.*" (Italics added.)

[32] *E.g.*, 98 Cong. Rec. 8870, Eighty-second Cong., Second Session (1952) (Humphrey); H. Rep. No. 1437, Eighty-second Congress, Second Session (1952) at 3.

The Ohio law also frustrates the aims and objectives of the antitrust laws announced by this Court —that combinations and boycotts which seek to create, maintain or extend price-fixing, with or without benefit of "fair trade," are unlawful under Section 1 of the Sherman Act. *United States v. Bausch and Lomb Co.*, 321 U. S. 707 (1941); *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *United States v. Parke, Davis and Co.*, 365 U. S. 125 (1961).

4. The rule of the "Masters Mail Order Co. of Washington" cases was sought to be overcome by the *national fair trade* provisions of the MacLachlan proposals and the Harris Bill. All persons with notice, anywhere in the United States would be required to maintain resale prices. House Rep. No. 467, Eighty-sixth Congress, First Sess. (June 9, 1959) at 6-7, 16, 19; MacLachlan, *supra*, 11 Vanderbilt L. Rev. 149, 153.

By the express terms of the Ohio legislation (Sec. 1333.29(B)(1), (2)), the proprietor may thwart the shipment of merchandise from Ohio into the hands of "discounters" inside or outside the State of Ohio. Hence, the interstate "diverter" problem of "fair-traded" merchandise is also sought to be met by the 1959 Ohio law.

The aim of the Ohio legislation, taken almost verbatim from the "purpose clause" of the 1959 version of the Harris Bill, is further clarified by the recital of the legislative policy in Section 1333.27(B):

> "Where fair, equitable, and competitive prices cannot be maintained *in all appropriate stages in the distribution of such identified merchandise*, the marketing of such merchandise is depressed and the quantity there-

of moving in the channels of commerce in the state declines." (Italics added.)

The objective of the 1959 law is to "organize the market" for the sale of goods in the course of commerce. The vehicle is the retained "proprietary interest." The Ohio Fair Trade Law authorizes the unlawful "organization of the market" at all levels of distribution by state authorized boycott, by unlawful horizontal price fixing and by the attempted binding of third persons by notice. A single unitary statutory scheme is contemplated, which is reflected in the provisions of the Ohio law.

III. The legislative history of the Ohio Fair Trade Law is devoid of any attempt to reconcile the statute with the federal fair trade enabling or other legislation.

The record of the legislative hearings before the House Judiciary Committee and the Senate Judiciary Committee of the Ohio Legislature is devoid of any attempt to reconcile the 1959 Fair Trade Law with the limitations of the Miller-Tydings or the McGuire Acts, or any other federal enactment bearing upon the Ohio law.

It would seem clear that the 1959 Ohio Fair Trade Law was never considered in terms of the limitations arising out of the antitrust laws of the United States. Section 1333.29(A) authorizes resale price maintenance in violation of Section 5(a)(5) of the McGuire Act and the ruling by this Court in *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956). By Section 1333.29(B), horizontal agreements are authorized between distributors, rather than simply "vertical" arrangements between a manufacturer, wholesaler and retailer.

There are few comments upon Section 1333.29(A) and (B). The principal spokesman for the Act, stated

"Section 29 authorizes contracts of the kind herein contemplated. Sub-section B provides certain additional things which are those things specifically authorized under the McGuire Act which may be included in any written contract.

Sub-section C states explicitly what I think would be implicit in this law, namely that any distributor who is himself bound by a contract with the proprietor is also a third party beneficiary of the contracts between that proprietor and other distributors of the same commodity." (R. 212; also R. 296)

The explanation for the retention by a "proprietor" of "proprietary interest" pursuant to Section 1333.31 is explained as a mere acknowledgment of "the commercial fact of life" (R. 213; also R. 297). Any relationship between this provision and the Lanham Act (15 U. S. C. Sec. 1051 *et seq.*) was not discussed.

With reference to the defense established by Section 1333.33 (D) arising from the removal of the trademark, no legislative consideration was given to the possible import of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. §§ 301, *et seq.* The legislative proceedings state:

"In other words, the distributor is only bound if he wants to cash in on the proprietor's good will, but he can't have his cake and eat it, too." (R. 214; also R. 297.)

The provision of Section 1333.29(A) authorizing a wholesaling manufacturer to set fair trade prices with his competing wholesalers is explained additionally as follows:

"Mr. Gorrell: I can say that very simply. That is to say that a manufacturer—let's say that he wears two hats. He manufactures some products but is also in the wholesale business. He can still fair trade his manufactured product at a fair trade price so long as he doesn't give his own wholesalers any advantages as a result of doing it.

I would say that the reason for that provision, right now—

Mr. Reno: I can't figure it out.

Mr. Gorrell: It says a proprietor may establish minimum resale prices for his wholesale distributor, not with advantage—and so forth—even though he sells such commodity to retailers in competition with distributors. It takes care of the man who sells direct or the man who is both a manufacturer and wholesaler." (R. 224.)

It would seem clear that the Supremacy Clause of the Constitution, the federal enabling statutes and any other applicable federal legislation were not seriously considered by the Legislature when the 1959 Fair Trade Act was under advisement.

IV. The attempt to bind third persons like appellant, who never bought merchandise from the proprietor by the "contract by notice" provisions of the Ohio law, exceeds any permissible limits of federal enabling legislation.

A. The conception of a "contract" disclosed by the Ohio legislative history is remote from any usual understanding of the term.

Section 5(a)(2) of the McGuire Act provides:

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any *contracts or agreements* prescribing minimum or stipulated prices, or requiring a vendee to enter into *contracts or agreements* prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is free and open competition with commodities of the same general class produced or distributed by others, when *contracts or*

agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale." (Italics added.)

In the views of informed advocates of fair trade, the federal enabling legislation and the state laws, "speak of 'contract' and hence a 'contract' is essential to enforcement of the minimum resale price." The admonition of the *Bausch and Lomb* case, 321 U. S. at 721 has been stressed, along with the further admonition that where the Congress and the Legislatures chose the device of a "contract * * * in determining whether the manufacturer has moved along the right route, it is wise to see whether the manufacturer has actually made a contract." National Wholesale Druggists' Association, *The Basis and Development of Fair Trade,* (3rd Ed., 1955) 32, 91, 92.[33]

In enacting the 1959 Fair Trade Law, the Legislature of Ohio and the sponsors of the statute began with the premise that a lawful fair trade act in the State of Ohio would require a "contract" as a prerequisite to binding any person to observe resale price maintenance. The spokesman for the legislation stated in the House Judiciary Committee of the Ohio Legislature (R. 209) with reference to the decision of the Ohio Supreme Court in the *Bargain Fair* case, 167 Ohio St. 181, 147 N. E. 2d 481 (1958):

"Although it is a little difficult to decide from the opinion what the Supreme Court had in mind, it ap-

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[33] John W. Anderson, President, American Fair Trade Counsel, Inc. in the *Hearings Before the Senate Subcommittee on Retailing, Distribution and Fair Trade Practices* of the Small Business Committee (1958), *Competitive Impact of Discount House Operations on Small Business* at page 316 referred to "* * * * the somewhat *cumbersome contract system of fair trade.* * * *"

parently objected to a person being bound by the provisions of a contract to which he had in no way been a party. *The Court in no way cast any doubt as to the validity and enforceability of a contract between a producer and a distributor providing minimum prices if the distributor was a party to that.*

"Does House Bill 318 answer the Court's constitutional objection? We think it does." (R. 209) (Italics added.)

The approach adopted in the 1959 legislation does not approach the conception of "contract or agreement." The principal spokesman for the legislation admitted that the statutory provisions made it "pretty hard to find any kind of a contractual relationship." The following colloquy took place:

"Mr. Rudd: Would this be on any stronger ground if instead of implying a contract between the retailer and the manufacturer or proprietor of the trade name, if you implied a contract between the retailer and the one from whom he bought the merchandise for the benefit of the proprietor, a third party beneficiary contract? There you would have escaped, perhaps, from the privity. * * * You have set up a contract between the retailer and someone with whom he has no contractual relationship.

Mr. Gorrell: The reason we have done that, and I recognize it. If we had drafted the legislation in that way, we would have gotten around the problem of the privity of contract, maybe, but the feeling of those who worked on that is this: Then you would be clearly having a—let's suppose that the retailer buys it from a wholesaler, neither one of whom have said anything at all about the stipulated price.

It is pretty hard to find any kind of a contractual relationship. It seems to me that we would have to face up to the privity of contract in order to go back to the man who was going to establish that price. Otherwise there might be an agreement between two

people who never said anything about establishing price," (R. 268-269.) (Italics added.)

The absence of "privity of contract" impelled the framers of the Ohio statute to attempt to formulate an "implied contract." The "implied contract" revolves about the conception of a "proprietary interest" retained by the trade-mark owner pursuant to Section 1333.31. The prevailing opinion of the Supreme Court held:

> "It is the intention of the new act to declare and protect the proprietary interest of a manufacturer in his trade-mark and the goodwill attached to it * * *. The means employed by the act is the long and well established legal doctrine of implied contract * * *." (R. 423-424.)

In Gorrell and Brown, *A Reexamination of Fair Trade Legislation in the Context of the New Ohio Fair Trade Act and the Decision in Hudson Distribs., Inc. v. Upjohn Co.* (1963), 15 Western Reserve L. Rev. 84, at 95, the "contract by notice," is analogized to an implied contract arising out of the acquisition of a piece of property;[34] *e. g.*, a candy bar (R. 418), or an apple.

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[34] "The Legislature found that the only difference between the 'consent' and 'in fact' situations is that in the former, a written contract between the parties exists, while in the latter, a contract arises by reason of the acts of the parties. The Legislature further recognized that nothing new or novel occurs in the establishment of a contract arising out of their acts between certain parties.

"If a person owns a piece of property, for example an apple, he may enter into an agreement with another person to sell that apple for five cents. A binding contract arises and the purchaser is obligated to pay the seller five cents. The seller also may place a sign on his apple saying, 'For Sale—5 cents.' If another person then comes along, reads the notice, and takes and eats the apple, he is equally obligated to pay the seller five cents. This result follows even if the apple eater says to himself while munching the apple, 'I intend to pay only three cents.' *The principle is the same whether the property interest transferred is an apple, a house, an exclusive franchise or license, or a trade-mark or trade name.*" (Italics added.)

The difficulties created by the absence of any "privity" of contract or consensual relationship between Upjohn and Hudson were also resolved by reference to the doctrine of "implied warranty."[35]

In sum, the legislative history of the 1959 Fair Trade Law discloses:

(1) It is "pretty hard" to find a "contractual relationship" in a case like that at bar, that is, where Hudson bought from a third party who, so far as Upjohn knows, never said anything about the price;

(2) The statutory "implied contract" arises from a "proprietary interest" reserved to the "pro-

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[35] E.g., R. 226; also R. 265-266, where the following appears:

"Chairman McGovern: I wonder if in all those instances there isn't a real distinction to be made in the cases where we are talking about the bulk sales law, conditional sales law, if we are not dealing with cases where implied terms are read into a contract that is voluntarily entered into by parties, wherein this proposed law, we are implying the contract itself. There is no contract set by—exempt by implication, regardless of terms.

Mr. Gorrell: I would submit, Miss McGovern, when anybody buys goods, there is a contract, even though it is just a unilateral contract, where they take the goods and pay for them, there is a contractual relationship. We are saying that a part of that contractual relationship is a part of this condition.

I think it is a contract, very simple one. If I go in the store and hand the man a dollar and say, 'Give me the piece of goods,' and he gives it to me, granted it is a contract that is executed right away, but I would think it is a contract.

Chairman McGovern: Very important to this is the remaining question of privity where you are buying this piece of goods at the end of the line and where somebody up at the end of the line has put a trademark on it, the manufacturer.

Mr. Gorrell: I agree.

I think our answer to that has to be that this recent line of cases which our Ohio Supreme Court has joined in the crowd moving that way in saying that privity of contract when you are dealing with anything where there has been publication, in effect, to the public as to what they are buying, the privity of contract is archaic and won't stand in the way of there being a contractual relationship, as in implied warranties." (Italics added.)

prietor" by the Legislature of the State of Ohio upon goods in commerce;

(3) By notice of the establishment of prices, a contract arises *in the sense of the doctrine of "implied warranties."*

It follows from the foregoing that in the absence of any "proprietary interest" retained on goods in commerce, in the sense of a piece of tangible property, there would be no "implied contract." The doctrine of "implied warranties" does not *create* a contract, since it is merely a doctrine for facilitating the recovery of damages by an injured tort claimant. *Rogers v. Toni Co.*, 167 O. S. 244, 147 N. E. 2d 612 (1958); Skeel, *Advertised Products Liability* (1959) 8 Cleveland Marshall Law Review 2, at 5.

B. An amendment to the federal enabling legislation is required to give validity to a "notice contract."

Both the House Report on the Harris Bill and the Hearings recognized that specific permission was required before a "contract by notice" affecting commodities in interstate commerce might be valid. H. R. 1253, Eighty-sixth Cong., First Session proposed specifically the amendment of Paragraphs 5(a)(2), (3), and (4) to add a reference to "notice" in the provisions referring to contracts and agreements.

H. Rep. No. 467, Eighty-sixth Cong., First Session stated at page 18:

"The only change proposed in paragraphs (2) (3) and (4) is to add a reference to 'notices' in the provisions referring to contracts and agreements. This change is made so that where a State law permits a manufacturer to establish a stipulated or minimum resale price by the giving of notice, the McGuire Act provisions will apply to the same extent that they now do in the case of State laws which permit the estab-

> lishment of such prices by contracts or agreements between manufacturers and their distributors. The committee has been informed that Virginia has modified its Fair Trade Act so as to permit the establishment of stipulated or minimum prices by notice."

The proponents of the Harris Bill also recognized the desirability of amendment in view of the Virginia legislation and similar contemplated legislation by other states. E.g., Testimony of Herman S. Waller, Counsel, National Association of Retail Druggists, *Hearings on H. R. 10572, etc.*, Eighty-fifth Cong., Second Session, pp. 478, 577.

The legislative history of the McGuire Act consistently refers to "signers" and "nonsigners" of "contracts and agreements." Under the Ohio law, there are now only "contractors." There are no longer "signers" and "nonsigners."

For purposes of fair trade, the mere giving of a notice does not create a "contract." It has accordingly been held in Ohio "that the provision of the 1959 Ohio Act requiring *no* 'contracts or agreements' within the purview of the Miller-Tydings Act or the McGuire Act, would not fall within the scope of such acts and any minimum resale prices established without such 'contracts or agreements' would be in violation of the Sherman Act." *Bulova Watch Co., Inc. vs. Ontario Stores of Columbus, Inc.*, 86 O. L. Abs. 585, 599, 176 N. E. 2d 527, 535 (1961), *aff'd without opinion*, Ct. of App. for Franklin County, June 19, 1962. The result in the *Bulova Watch* case is clearly correct. *Cf.* Derenberg, *Trade Regulation*, N. Y. U. 1958 Annual Survey of American Law, 189; Weston, *Fair Trade, Alias "Quality Stablilization": Status, Problems and Prospects*, 22 ABA Antitrust Section, Vertical Arrangements 76, 92-93 (1963). In discussing the requisites of a "contract," The Basis and Development of Fair Trade (3d Ed., 1955),

published by the National Wholesale Druggists' Association states (32-33):

> "mere notice without such assent will not do. Assent to fair trade prices and agreement to observe them will not be implied from a legend upon an invoice which accompanies the goods and the retention of the goods by the buyer."

Hoffman-La Roche, Inc. v. Weissbard, 19 N. J. Super., 210, 88 A. 2d 238 (1952), *affirmed* 11 N. J. 541, 95 A. 2d 398 (1953); *Johnson & Johnson v. Charmley Drug Co.*, 11 N. J. 526, 95 A. 2d 391 (1953).

C. The Virginia Courts have declined to give effect to a "notice contract" under the circumstances of this case.

The Virginia Courts, including the Supreme Court of Virginia, have construed the 1958 Virginia Fair Trade Law as not binding upon a third person who does not acquire the merchandise directly from the "proprietor."

In *Bulova Watch Co., Inc. v. Zale-Norfolk, Inc.* (Number 2570, Court of Law and Chancery in the City of Norfolk)[36] Bulova sold merchandise directly to the defendant until the end of 1960. In the spring of 1961, Bulova mailed a minimum retail price list to the respondent. At the trial, Bulova offered in evidence a fair trade agreement dated November 8, 1960, with another retailer. Defendant admittedly sold complainant's commodity below the minimum retail price set forth in the price list mailed by complainant.

The Court found as a fact "that the evidence shows that the respondent had actual notice of the minimum retail price of complainant's commodity which constituted an offer"; and that respondent, Zale-Norfolk, Inc., obtained Bulova watches from a source other than

[36] Certified copy of Opinion reprinted in full in Appendix B hereto.

the complainant. Over plaintiff's objection the Court declined to receive evidence as to defendant's exact source of the goods, other than that it had not purchased directly from Bulova.

In denying relief to Bulova, the Court held:

> "In the latter case (*Standard Drug v. General Electric*), General Electric shipped its commodity bearing its trade mark to Standard Drug at a time when the latter had in its possession a list of the fair trade minimum retail prices. In the instant case, the court is of the opinion that the evidence shows that the respondent had actual notice of the minimum retail prices of the complainant's commodity which constituted an offer. *However, the respondent obtained the complainant's commodity from a source other than the complainant.*
>
> "The court is of the further opinion that *the receipt of the commodity from a source other than the manufacturer cannot be deemed an acceptance by the respondent, for the respondent was not a party to the agreement or in privity with either of the parties, and the Fair Trade Act is limited to voluntary agreements. To hold otherwise would be to write into the law that which has been removed from it, to-wit: the 'non-signer' provision.*" (Italics supplied.)

The Supreme Court of Virginia denied review on March 1, 1962.[37]

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[37] Appendix B, pp. 101-102, *infra*:

"The petition of Bulova Watch Company, Inc., a New York corporation, for an appeal from a decree entered by the Court of Law and Chancery of the City of Norfolk on the 7th day of September, 1961, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and Zale-Norfolk, Inc., t/a Zale's Jewelers, was defendant, *having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right,* doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said Court of Law and Chancery." (Italics supplied.)

The Virginia courts have confined the ruling in *Standard Drug* to its proper facts—the direct sale of merchandise from the fair trader to the defendant *under circumstances where defendant's consent to the fair trading might possibly be inferred.*[38]

The Virginia holding does not accord with the general law. A notice does not create a "contract or agreement" within the meaning of the federal enabling legislation:

> "Mere notice without such assent will not do. Assent to fair trade prices and agreement to observe them will not be implied from a legend upon an invoice which accompanies the goods and the retention of the goods by the buyer."
>
> The National Wholesale Druggists' Association, *The Basis and Development of Fair Trade* (3rd Ed., 1955) pp. 32-33.

At common law, a third person with notice of a resale price maintenance agreement between two others would not be bound by "notice" of the contracts. The Massachusetts Supreme Court held that, even though a manufacturer of a drug invariably sold it under a contract that the purchaser would observe a minimum resale price, a "nonsigner" retailer who in some way had obtained a

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[38] The limitation inherent in the Virginia Fair Trade Act was recognized by the Brief of the General Electric Company in *Standard Drug Company, Inc. v. General Electric Company*, 202 Va. 367, 117 S. E. 2d 289 (1960), *app. dism.*, 368 U. S. 4 (1961) at 34.

> "Here, we repeat that in this case we are not concerned with a retailer who may have acquired the commodity without notice of the restriction, or even one who acquired the commodity from an intermediary. We are dealing with a retailer in direct privity with the manufacturer, one who bought *directly* from the manufacturer and one who admits *actual* notice (not simple notice by way of a statement attached to the container, but notice by letter). * * *."

quantity of the product could not be restrained from cutting the price. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901).

V. The Ohio Legislature has exceeded any permissible limits of state power (a) in attempting to separate the trade-mark from the commodity in the course of interstate commerce, and (b) in impliedly authorizing the removal of labels from drugs in commerce.

A. The State of Ohio has sought to introduce a new concept of trade-mark law.

In comments both upon the Harris Bill and the "Quality Stabilization" Bills, the Department of Justice, the Federal Trade Commission, and other agencies of Government have expressed concern at the revolution proposed to be effected in our property concepts.[42] The theory of the Harris Bill, incorporated into the Ohio law, was that a "proprietary interest" was to be retained by the proprietor in the *fair-traded commodity*. The theory of the later Quality Stabilization Bills is that the owner of the brand, name or trade-mark is to retain an interest in the *brand, name or mark* itself, as the commodity wends its way through successive channels of commerce.

What has been proposed by these Bills to be accomplished by Act of Congress under the "commerce clause," the State of Ohio has attempted to accomplish by Act of the Legislature.

The contention that a trade-mark might have an existence independent from the good will of the business to

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[42] H. Rep. No. 467, Eighty-sixth Cong., First Sess. (1959) on H. R. 1253 ("Harris Bill") 25-30; H. Rep. No. 566, Eighty-eighth Cong., First Sess. (1963) on H. R. 3669 ("Quality Stabilization") 17-28.

which it appertains or the commodity to which it is applied had been made in litigations in which the Sunbeam Corporation asserted that a tort had been committed by the sale of its products below the manufacturer's stipulated price. This contention has been summarily and uniformly rejected. *Sunbeam Corp. v. Wentling*, 192 F. 2d 7 (C. A. 3, 1951); *Sunbeam Corp. v. Pay Less Drug Stores*, 113 F. Supp. 31 (N. D., Calif., 1953).

The most ardent advocates of fair trade have been unable to find any basis in law for the kind of "proprietary interest" attempted to be reserved by a proprietor upon commodities in interstate commerce. In the 1959 Congressional Hearings (*Hearings on H. R. 768, etc.*, H. Rep., Eighty-sixth Cong., First Sess.) John W. Anderson, President, American Fair Trade Association, and President, Quality Brands Association of America, Inc. refused to endorse the Harris Bill (653-654). Said Mr. Anderson:

> "I want you to note carefully in the Harris bill one thing. I will go no further. *That is that the Harris bill endeavors to establish a hitherto undreamed of proprietary interest of the manufacturer in the product itself, 'continuing after its sale and delivery and through the various steps of distribution. We have sought diligently, but have found absolutely no basis in established law for that concept.* We found nothing to indicate which way Federal courts would move when asked to support this novel concept of law."

The Lanham Act, 15 U. S. C., Section 1127 has made clear the intention that the subject of trade-marks in commerce has been pre-empted by the Congress.

The section states in part:

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such

commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; * * *"

It has been held that the Lanham Act manifests a Congressional intent to pre-empt the field of fair trademarks in commerce. In *Time, Inc. v. T. I. M. E. Inc.*, 123 F. Supp. 446 (S. D., Calif., 1954) the Court stated at page 452:

"Nor is there any room to view state law as complementary to the Lanham Act in the face of undoubted Congressional intent to occupy completely a field to the full extent constitutionally permissible. Cf. Missouri Pacific R. Co. v. Porter, 1927, 273 U. S. 341, 345-346, 47 S. Ct. 383, 71 L. Ed. 672; McDermott v. Wisconsin, 1913, 228 U. S. 115, 132-133, 33 S. Ct. 431, 57 L. Ed. 754."

Accord: Diggins, *Federal and State Regulation of Trade-Marks* (1949), 14 Law and Contemporary Problems 200, esp. 206-207, 213-215, 219.

The legislative history of the McGuire Act does not warrant the interpretation that either the McGuire Act or the Lanham Act was to operate as a source of new and independent authority to the states for the transformation of a trade-mark into *an entity separated from either the good will of the business or as affixed to the commodity so that the "proprietary interest" would thereby achieve a separate status of an apple, a candy bar, or any other piece of tangible property.*

This Court has held in *United States v. Univis Lens Co.*, 316 U. S. 241, at 250 (1942), that a patentee could not control the alienability of his commodity after he had sold it:

"* * * his monopoly remains so long as he retains ownership of the patented article but the sale of it ex-

hausts the monopoly in that article and the patentee may not thereafter, by virtue of his patent control the use or disposition of that article." (Citing authorities.)

Ethyl Gasoline Corp. v. United States, 309 U. S. 436 (1940).

As for owners of trade-marks *a fortiori* they cannot do what is forbidden to a patentee. *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 721 (1944); Handler, *Trade-Marks and Antitrust Laws*, (1948) 37 Trade Mark Reporter 387, 397-399.

The bill enacted by the Legislature of Ohio would repeal the established law of copyrights and patents. Price fixing powers which this Court has denied to holders of patents and copyrights, the State of Ohio would confer upon holders of trade marks and trade names.

The Lanham Act has made perfectly plain that its purpose was to eliminate and avoid such interference by the states with the rights in trade-marks declared by the Congress.

B. The State of Ohio has Impliedly Authorized the Tortious and Unlawful Removal of Labels From Drugs in Commerce.

The retailer's obliteration of Upjohn's trade-marks would be tortious and unlawful. The suggestion of Section 1333.33 (D)[39] that the retailer may achieve a "full" vesting

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[39] "Sec. 1333.33. It shall be a defense to an alleged violation of section 1333.32 of the Revised Code, for a distributor to prove that a commodity has been advertised, offered for sale, or sold:

* * * * *

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trade-mark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade-name of the proprietor."

of title in the commodity by obliterating the trade-mark is fairly impossible of achievement. The retailer will have committed the tort of unfair competition and also be in violation of federal and state drug laws forbidding the obliteration or concealment of trade-marks.

Circuit Judge Goodrich in *Sunbeam Corporation v. Wentling*, 192 F. 2d 7, at 8 (1951), showed how the obliterator of trade-marks who "passed off" Upjohn's goods as his own would find himself in serious trouble as a tort-feasor.

Said the Court:

> "* * * Sunbeam says that if Wentling wants to sell its razors below the established price he should take off the identifying trade-mark. Suppose he did. He certainly could not put on his own mark and sell Sunbeam razors as his, Wentling's. And if he sold them with no mark at all but just as 'good electric razors' could not Sunbeam, on the very argument it makes here, complain that Wentling was interfering with its trade-mark by not allowing the customer to know that the good razor which he buys from Wentling is in fact made by Sunbeam? If Sunbeam's argument made to us is sound, we do not see why the other conclusion would not follow. * * * "

The Federal Food, Drug, and Cosmetic Act prohibits (21 U. S. C., Section 331(b)) the "misbranding of any food, drug, device, or cosmetic in interstate commerce."

21 U. S. C., Section 352(a) defines a drug as misbranded "if its label is false or misleading in any particular"; and by Section 352(b)(1) a drug is misbranded "If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor;" The laws of Ohio contain the same definitions of "misbranded drugs." O. R. C. Section 3715.64 (A)(1), (2)(a).

The removal of labels on drugs is contrary to the national policy expressed by the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A., Section 331 (k),[40] and may well be criminal. *United States v. Sullivan*, 332 U. S. 689 (1948).

It would seem then that the invitation of the Ohio Legislature to the retailer to misbrand Upjohn drugs as his own, is an invitation to civil and penal liability. The fairly cynical character of a proposal to obliterate trademarks was recognized by the proponents of the first Harris Bill during the Hearing thereon.[41]

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[40] "Sec. 331. The following acts and the causing thereof are prohibited:

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

[41] Testimony of Herman Waller, Counsel, National Association Retail Druggists, Hearings before a Sub-Committee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess. on H. R. 10527, etc. (Harris Bill) 577:

"If he does not want to use the trademark of the manufacturer, let him scrub it off and sell it without it. He can do that if he wants to.

Of course, he may run up against the defacement of trademarks, but that is another story but that is the purpose of the act, and that is what you are trying to do here, to protect that property right against being abused, abused by retailers who seek that little edge of getting something lower, lower, lower." (Italics added.)

VI. The Upjohn fair trade "notice" to appellant violates Section 1 of the Sherman Act; and was given pursuant to a statute which contemplates "fair trading" at all levels of distribution in violation of Section 1 of the Sherman Act.

(a) A resale price maintenance contract sought to be enforced pursuant to a statute which is beyond the federally authorized scope of the federal fair trade enabling legislation violates Section 1 of the Sherman Act. It will not bind appellant. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951). *Cf. Esso Standard Oil Company v. Secatore's, Inc.*, 246 F. 2d 17 (C. A. 1st, 1957); *Texas Co. v. DiGaetano*, 39 N. J. 120, 187 A. 2d 721 (1963).

The Ohio statute is wholly beyond the permissible scope of state resale price maintenance legislation in providing a conception of "proprietary interest" which separates the trademark from the commodity. "Notice" of the separated "proprietary interest" is then sought to be made into a contract with appellant.

For these reasons, alone, appellant would not be bound by the "notice contract" sought to be imposed upon it by Upjohn.

(b) In accordance with the contemplation of the Ohio statute, Upjohn has "organized the market" at every level of distribution:

A. *Noncontracting Retailers.* Upjohn has given "notice" to retailers like appellant that it has established minimum or "fair trade" prices for its products (R. 27).

B. *Contracting Retailers.* The contracting retailers have signed contracts drawn by reference to

Section 1333.28(I). The contract recites the retention by Upjohn of an interest in the "good will and public acceptance of the products bearing its trademarks, brands or names * * * so long as commodities bearing its trademarks, brands or names are offered for sale in commerce" (R. 25). Upjohn and the retailer agree that "Retailer may enjoy the benefit of the good will symbolized thereby by referring to said trademarks, brands or names in the promotion of sales of said commodities by Retailer" (R. 25).

C. *Wholesalers.* Upjohn has organized price maintenance at the wholesale level either by notice to wholesalers (R. 95-96), or by *del credere* agency arrangement (R. 105-108). Such arrangements have been made with McKesson and Robbins, Inc., a manufacturer of "proprietary drugs" (R. 184) and also a competing wholesaler of Upjohn in drug sales to pharmacies of Upjohn products (R. 89).

Such arrangements appear to violate both Section 5(a)(5) of the McGuire Act and the principles enunciated in *United States v. Masonite Corp.*, 316 U. S. 265 (1942).

As this Court said (316 U. S. 256 at 279-280):

"* * * when it is clear, as it is in this case, that the marketing systems utilized by means of the del credere agency agreements are those of competitors of the patentee and that the purpose is to fix prices at which the competitors may market the product, the device is without more an enlargement of the limited patent privilege and a violation of the Sherman Act. In such a case the patentee exhausts his limited privilege when he disposes of the product to the del credere agent. He then has, so far as the Sherman Act is concerned, no greater rights to price maintenance than the owner of an unpatented commodity

would have. *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502."

Upjohn's activities in "organizing the market," accord with the intentions of Professor MacLachlan's proposals and the different variations of the Harris Bill. It would seem obvious that the State of Ohio has attempted to authorize what was contemplated to be enacted as a single unitary piece of legislation on a wholly novel theory in commerce, which only the Congress is competent to enact.

VII. The 1959 Ohio Fair Trade Law accomplishes a deprivation of due process under the Fourteenth Amendment by reason of an uncontrolled and arbitrary delegation of power over the property and business lives of others without any procedural safeguards.

Appellant bought and paid for commodities with the Upjohn trade-marks thereon from a wholesaler in Michigan where the nonsigner clause of the Michigan Fair Trade Act is ineffective. *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 343 Mich. 109, 54 N. W. (2d) 268 (1952). By the law of Ohio, part of Appellant's interest in the Upjohn commodities is transferred to Upjohn despite the intervening sales.

The retention of the "proprietary interest" in the commodity by the "proprietor" is made mandatory by the terms of Section 1333.31 so long as the commodity is identified by the trade-mark or trade name of the "proprietor."[43] The mandatory definition, moreover, encompasses

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[43] Section 1333.31 provides:

"A proprietor *shall* retain a proprietary interest in any commodity with respect to which he is a proprietor after he

(Continued on following page)

every trade name or trade mark of the "proprietor," whether he be a "sham" or "token enforcer" of resale price maintenance[44] or a vigorous enforcer; or whether the trade-mark or trade name be "strong" or "weak" or "misleading" or the subject of pending injunction or cancellation proceedings, etc.

The "proprietary interest" is given life, however, only upon the arbitrary decision of the "proprietor" to "fair trade" the commodity. The "proprietary interest" ceases upon the unilateral decision of the "fair trader" to abandon resale price maintenance.

The proprietor's power of decision upon the retention of a "proprietary interest" is matched by the unilateral power given by the statute to the trade-mark owner over the business life of others. By Section 1333.29 (B) (2) and (3), in his sole unfettered discretion, the "proprietor" can by notice or contract deputize and compel every person in his distribution system to assist in the enforcement of fair trade prices, both inside and outside of

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(Continued from preceding page)

has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name."

Section 1333.28 (G) and (H), defining "trade-mark" and "trade name" provide:

"'Trade-mark' means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

'Trade name' means personal names, and any word, words, symbol, or symbols, used by producers or distributors to identify their companies, firms, or corporations."

[44] Note: *The Operation of Fair Trade Programs* (1955) 69 Harv. L. Rev., 316, 331-332.

Ohio. The stream of interstate and intrastate commerce at wholesale and retail levels may be effectively dammed up unless resale is effected within lines demarcated by the proprietor, i.e.:

(a) resale by the initial vendee at the fair trade price for his particular level of distribution; and

(b) resale to subsequent vendees who observe fair trade at their respective levels of distribution, and who will in turn require observance by their subsequent vendees.

In *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183 (1936) the statute before this Court permitted only resale price maintenance. This Court held that such a statute does not unlawfully delegate legislative authority, nor does it violate due process.

The Ohio statute goes much further. It gives an arbitrary power to one person to generate property interests in goods bought by another, as well as power to regulate the business life of such other.

Failing to abide by such private regulation, a retailer faces the possibility of litigation from every beneficiary of the notice including (a) the proprietor of the trade-mark, and (b) every other person who has either signed a fair trade contract, or (c) who has been served with a notice which also includes a business restriction. Revised Code, Section 1333.29(B)(3).

The conferring by the State of Ohio of an unrestrained discretion upon "proprietors" over the business life of others in the use of their property, in addition to the control of the resale price, clearly constitutes an unlawful delegation of legislation to private persons without any procedural safeguards or standards whatsoever.

As this Court stated in *Carter v. Carter Coal Co.*, at 298 U. S. 238, 311 (1936):

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. *Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests.* The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, *since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor.* And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclose the question." (Italics added.)

The history of fair trade shows strong opposition to fair trade legislation from many segments of retail business. Report of the Select Committee on Small Business on "*Fair Trade: The Problem and the Issues*," H. Rep. No. 1292, Eighty-second Cong., Second Sess. (1952), at 22 to

24; Federal Trade Commission, Report on Resale Price Maintenance (1945) 61. The hearings of the last several years indicate a division of opinion in retailing similar to that of a decade ago.

As in the case at bar, the interest of the fair trading "proprietor" and its retailing friends may be wholly at variance with the interests of those like Hudson, whose prices and business practices are sought to be regulated—to their great detriment.

This Court has recently manifested its concern for securing opportunities of procedural due process where, by private action, grave harm may be inflicted upon others. Cf. *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963). In the last ten years many states have held that their respective state constitutions prohibit such a delegation of legislative authority. Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses* (1961), 109 U. of Penn. L. Rev. 539, 545-553. Where the State of Ohio has delegated to private persons the authority to inflict great harm upon others, without any procedural safeguards and without any standards or opportunity for hearing and adjudication, rights of procedural due process granted by the Fourteenth Amendment would appear to have been violated.

As was held in *Browning v. Hooper*, 269 U. S. 396, 405 (1926):

> "* * * It is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the Legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the state to hear them, or to consider and determine whether the

road improvements in question would benefit their lands. The act is repugnant to the due process clause of the Fourteenth Amendment."

Accord: Washington ex rel. Seattle Trust Co. v. Roberge, 278 U. S. 116, 122 (1928); *Carter v. Carter Coal Co.*, 298 U. S. 238, 311 (1936); Note, *Delegation of Power to Private Parties*, 37 Colum. L. Rev. 447, 458 (1937); Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 217 (1938).

Since so many courts in recent years have declined to give effect to the reasoning and philosophy of the *Old Dearborn* case, it is suggested that this Court may wish to reconsider its views in that case.

CONCLUSION.

Appellant prays that this Honorable Court, in the exercise of its jurisdiction pursuant to 28 U. S. C., Section 1257(2), reverse the judgment of the Supreme Court of Ohio, and declare, for the reasons herein set forth, that Ohio Rev. Code, Sections 1333.27 through 1333.34 is unconstitutional by reason of conflict with the Supremacy Clause of the Constitution of the United States and violation of the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX A.

CONSTITUTIONAL PROVISIONS INVOLVED.

ARTICLE VI, CLAUSE 2—*Supremacy Clause.*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENTS, ARTICLE XIV, SECTION 1—*Due Process Clause.*

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATUTES INVOLVED.

Miller-Tydings Amendment to Sherman Act.

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory,

or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other * * *."

The McGuire Act.

"SEC. 5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State,

Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

Ohio Fair Trade Act of 1959.

(Ohio Revised Code Sections 1333.27 through 1333.34.)

Sec. 1333.27. (A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifically granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing all for the benefit of the consumer and the well-being of the citizens of the state.

(B) It is the further purpose of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to

afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers.

Sec. 1333.28. As used in Sections 1333.27 to 1333.34, inclusive, of the Revised Code:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person engaged in business selling a commodity to consumers for use.

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

(F) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, or any unincorporated organization.

(G) "Trade-mark" means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

(H) "Trade name" means personal names, and any word, words, symbol, or symbols, used by producers or distributors to identify their companies, firms, or corporations.

(I) "Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of Section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

(J) "Notice" means actual notice given by any method provided in Section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence.

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such producer or distributor the sole authority to establish

minimum resale prices for such commodity in the state.

Sec. 1333.29. (A) It shall be lawful, anything in Sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding Section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale

price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor; for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or notice authorized by, and entered into pursuant to any of the provisions of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

Sec. 1333.30. Actual notice of stipulated minimum resale prices may be given to any person by mail, through advertising, or through notice attached to merchandise, to containers, packages, or dispensers thereof, or on the invoice therefor, or imparted orally. Deposit in the United States mail, with postage prepaid, of a letter properly addressed to a distributor and specifying minimum resale prices established by a proprietor shall constitute prima facie evidence of actual notice to said distributor of such resale prices. The acquisition of or dealing in merchandise clearly marked, or enclosed in containers, packages or dispensers clearly marked, or the invoice for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices. Actual notice may also be otherwise established by legally admissible evi-

dence. A person with actual notice of any applicable minimum resale price is thereby charged with notice that such a price is subject to change.

Sec. 1333.31. A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trademark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

Sec. 1333.32. (A) Except as provided in Section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price, at less than such stipulated minimum resale price to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with such sale or offering to sell and the sale or offering for sale of such commodity with any other commodity for a

single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof, or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor; provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of Sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

Sec. 1333.33. It shall be a defense to an alleged violation of Section 1333.32 of the Revised Code, for a distributor to prove that a commodity has been advertised, offered for sale, or sold:

(A) In closing out such distributor's stock of such commodity for the bona fide purpose of discontinuing dealing in such commodity and plain notice of that fact is given to the public; provided, the distributor of such stock shall give to the proprietor of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock of such commodity at the original invoice price;

(B) When the stock of such commodity is altered, secondhand, damaged, defaced, or deteriorated and plain notice of that fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and affixed to the commodity;

(C) By an officer acting under an order of court;

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trademark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor.

Sec. 1333.34. Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in Section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.

APPENDIX B.

Letter Opinion from Judge Walter A. Page, Judge of the Court of Law and Chancery of the City of Norfolk to Counsel in Bulova Watch Company vs. Zale-Norfolk, Inc.

COURT OF LAW AND CHANCERY
OF THE CITY OF NORFOLK
Norfolk, Virginia

August 18, 1961

Mr. John D. Leitch, Jr.
Board of Trade Building
Norfolk, Virginia

Mr. Herman A. Sacks
Sacks, Sacks & Jordan
Bank of Commerce Building
Norfolk, Virginia

Re: Bulova Watch Company, Inc., a New York Corporation v. Zale-Norfolk, Inc., T/A Zale's Jewelers, a Virginia Corporation
File #2570

Gentlemen:

In setting forth the conclusions of the court reached in the above-styled matter, a brief review of the evidence is proper.

The complainant, Bulova Watch Company, Inc., sold to the respondent, Zale-Norfolk, Inc., trading as Zale's Jewelers, until the end of 1960. In the spring of 1961 the complainant sent a minimum retail price list to the respondent by mail. The district manager of the respondent denied knowledge of its receipt. Complainant offered in evidence, over the objection of counsel for the respondent, a fair trade agreement dated November 8, 1960,

between the complainant and Kingoff's of Roanoke, Inc. The respondent does not deny selling the complainant's commodity below the minimum retail prices as set forth in the hereinabove referred-to list.

The complainant contends that in accordance with section 59-8.2(10) the respondent had actual notice and that by acceptance of the commodity from any source, whether the manufacturer, wholesaler or retailer, and the resale of same below the minimum retail prices fixed by the manufacturer, unfair competition resulted in violation of the provisions of The Fair Trade Act of Virginia and prays injunctive relief.

The respondent contends that the contract with Kingoff's is irrelevant and not binding on the respondent; that there was no contract, either expressed or implied, between the parties; and that even if the mailing of the retail price list is deemed an offer which the respondent denies, there was no acceptance by the respondent because the respondent had not received or accepted any commodities from the complainant since 1960.

The court is of the opinion that the contract with Kingoff's is inapplicable in that the respondent was not a party thereto and, therefore, the court is not called upon to pass on the question of whether or not that contract is in accordance with the provisions of The Fair Trade Act, and, more particularly, the provisions of section 59-8.3 (Code, 1950, as amended).

There being no written contract, the question before the court is whether there was a voluntary agreement, that is, an offer and an acceptance. In *Benrus Watch Company v. Kirsch,* 198 Va. 94, the court held that the "non-signer" provision (section 59-7, Code, 1950) of the then Fair Trade Act (Chapter 1, Title 59, Code, 1950) was in conflict with and repealed by section 59-20 and section 59-40,

Code 1950, of the Anti-Monopoly Act. The court found it unnecessary to determine whether the "non-signer" provision then embodied in section 59-7 was unconstitutional.

In *Standard Drug v. General Electric*, 202 Va. 367, the court held that the present Fair Trade Act meets the tests of constitutional validity and that as stated by Mr. Justice Miller at page 375, "by elimination of the 'non-signer' provision and substitution of the provision that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional."

The court further held that section 59-8.2(10) (Code, 1950, as amended) defining "contract" must be read with section 59-8.3 (Code, 1950, as amended), and that the notice is the offer to make a contract. At page 379 the court uses the following language:

> "Acceptance of the commodity for resale with notice attached stating its minimum retail price constitutes prima facie evidence of actual notice to the retailer of the imposed minimum resale price; acceptance with actual notice of the minimum resale price is deemed assent to the terms imposed in the notice. Voluntary acceptance of the commodity with actual notice of the imposed minimum retail price creates the contract."

In the latter case General Electric shipped its commodity bearing its trade-mark to Standard Drug at a time when the latter had in its possession a list of the fair trade minimum retail prices. In the instant case, the court is of the opinion that the evidence shows that the respondent had actual notice of the minimum retail prices of the complainant's commodity which constituted an offer. How-

ever, the respondent obtained the complainant's commodity from a source other than the complainant.

The court is of the further opinion that the receipt of the commodity from a source other than the manufacturer cannot be deemed an acceptance by the respondent, for the respondent was not a party to the agreement or in privity with either of the parties, and the Fair Trade Act is limited to voluntary agreements. To hold otherwise would be to write into the law that which has been removed from it, to-wit: the "non-signer" provision.

The court is, therefore, of the opinion that the relief prayed for should be denied.

A decree carrying out the foregoing and noting the exceptions of counsel for the complainant may be presented at the convenience of counsel.

Very truly yours,

/s/ WALTER A. PAGE

Walter A. Page

Judge

WAP: meg

VIRGINIA:

IN THE COURT OF LAW AND CHANCERY
OF THE CITY OF NORFOLK

BULOVA WATCH COMPANY, INC.,
a New York Corporation,

Complainant,

vs.

ZALE-NORFOLK, INC.,
T/A ZALE'S JEWELERS,
a Virginia corporation,

Defendant.

DECREE.

This cause came on this day to be heard upon the Bill of Complaint filed by complainant, the defendant's answers to said Bill of Complaint and upon the evidence taken ore tenus, and was argued by counsel for both parties.

Upon consideration whereof, it appearing to the Court that the complainant manufactures watches, radios and other commodities which bear its trade name, the minimum prices of which commodities for resale is fixed by it; that the defendant has sold, and continues to sell, at retail, watches and other commodities manufactured by the complainant but not purchased by it from the complainant, at prices below the minimum prices fixed for resale by complainant; that there is no contract between the parties, expressed or implied, whereby the defendant agreed to sell at retail any of the commodities so manufactured by complainant at the prices fixed by the latter,

by reason whereof the defendant is not obligated to sell said commodities as manufactured by complainant at the minimum prices fixed by complainant for resale of such commodities.

The Court doth, therefore, ADJUDGE, ORDER and DECREE that the defendant is not obligated to complainant to sell any watches or other commodities manufactured by complainant at the minimum resale price fixed by complainant.

And the Court doth further ADJUDGE, ORDER and DECREE that the complainant is not entitled to the relief prayed for by it in the Bill of Complaint, and that the said Bill of Complaint be, and hereby is, dismissed, to which action of the Court the complainant excepts.

To the Clerk of the Court of Law and Chancery of the City of Norfolk, enter this Decree in vacation 9-7-1961.

WALTER A. PAGE,

Judge.

Certified copy of decree of Supreme Court of Virginia on the petition of Bulova Watch Company vs. Zale-Norfolk, Inc.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 1st day of March, 1962.

The petition of Bulova Watch Company, Inc., a New York corporation, for an appeal from a decree entered by the Court of Law and Chancery of the City of Norfolk on the 7th day of September, 1961, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and Zale-Norfolk, Inc., t/a Zale's Jewelers, was defendant, having been maturely considered and a

transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said Court of Law and Chancery.

A Copy, Teste:

H. G. TURNER,
Clerk.

Certification by Clerk of Court of Law and Chancery of the City of Norfolk.

STATE OF VIRGINIA,
CITY OF NORFOLK, TO-WIT:

I, W. L. Prieur, Jr., Clerk of the Court of Law and Chancery of the said City of Norfolk, and State of Virginia, do hereby certify that the foregoing and annexed opinion of the Court, Decree and Mandate of the Supreme Court of Appeals of Virginia, are true and exact copies of the original taken from the Records of said Court, in the chancery cause of Bulova Watch Co., Inc. v. Zale-Norfolk, Inc. etc.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at my office, this 5th day of September A. D., 1962, in the 187th year of the Commonwealth of Virginia.

(Seal)

W. L. PRIEUR, JR.,
Clerk.

STATE OF VIGINIA,
CITY OF NORFOLK, TO-WIT:

I, Walter A. Page, a Judge of the Court of Law and Chancery of the said City of Norfolk, in the State of Vir-

ginia, do certify that W. L. Prieur, Jr., who hath given the preceding certificate, is Clerk of the said Court, and that his said attestation is in due form.

Given under my hand, this 5th day of September, A. D., 1962.

WALTER A. PAGE,
Judge of the Court of Law and Chancery of the said City of Norfolk.

STATE OF VIRGINIA,
CITY OF NORFOLK, TO-WIT:

I, W. L. Prieur, Jr., Clerk of the said Court of the said City of Norfolk, and State of Virginia, do hereby certify that Hon. Walter A. Page whose genuine signature appears to the Certificate above, is a Judge of the said Court, and that all his official acts as such are entitled to full faith and credit.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at my office, this 5th day of September A. D., 1962, in the 187th year of the Commonwealth of Virginia.

W. L. PRIEUR, JR.,
Clerk.

(Seal)